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THE recent decision of Judge Caldwell, at Little Rock, in the original package case, involving questions arising under the Wilson bill, it seems to us, places the matter in the proper light and removes some of the fallacies indulged in on both sides of the question. Aside from his declaration upholding the validity of the Wilson bill, which we believe will not stand, his view of the effect of that act, if valid, upon State prohibitory laws, is undoubtedly the correct one. It has been asserted, even by some of the federal judges, if we mistake not, that State prohibitory laws, in so far as they affected liquors in the original packages, were not in fact in existence at the time of the passage of the Wilson law, since in that respect they had been pronounced unconstitutional by the Supreme Court of the United States; that the right of the State to this new exercise of the police power comes for the first time and alone from the enactment of the Wilson law, and that the State cannot apply the law until it passes a new law, forbidding the traffic in original packages. Judge Caldwell, on the contrary, calls attention to the fact that by the act of congress, the right which the importer previously enjoyed of selling liquor in the original package in the State where the transit ended, regardless of the laws of such State, is taken away by the act declaring that the "liquor shall upon its arrival in such State or Territory be subject to the operation and effect of the laws of such State." By the terms of the act, the original package, "upon arrival" in the State, is put on the same footing with liquors produced in the State. The original package, when it arrives within the State where the transit terminates, is at once reduced to the rank of domestic liquor, enjoys no privileges not enjoyed by domestic liquors, and is subject to the operation and effect of the laws of such State enacted in the exercise of its police powers to the same extent and in the same manner as domestic liquor. To the contention that the supreme court declared these State laws to be unconstitutional, in so far as they prohibited the sale of liquors by the importer in the original package, it may be said that the supreme court in no respect declared them unconstitutional or invalid, so far as domestic liquor is concerned. And the effect of the act of congress was simply to place original packages on their arrival within a State, on the same footing with liquor produced within the State, and as much amenable to the State law as if they had never existed in the form of original packages. In other words, it is not the laws of the State but the original package that is dead. The obvious design and intention of congress was to withdraw at once the protecting shield of interstate commerce from original packages of liquor the moment they entered the State.

WE cannot but believe that some of these days there will a reversal of the "original package" decision, and in this view we are not alone, as appears from some remarks recently made by Senator Edmunds, at a meeting of the Vermont Bar Association. Mr. Edmunds spoke briefly, but forcibly, saying: "It has been a hundred years since the national government was formed out of the States and by the States, and for the first time in that hundred years has risen a question as to the extent and scope of the functions that the States have hitherto exercised, and without the preservation of which the Union could not have been formed, for not a single State would have gone into it. We are told now that if the principle is carried out, it is not possible for a State without the consent of congress (and how congress ever got the power, except in the several instances named in the constitution, I am unable to say)—that a State cannot without the consent of congress regulate its own internal affairs. I don't believe that sort of doctrine is going to stand review in the courts." He proceeded to declare his conviction that the people of the States should have the charge of the preservation of their own autonomy, whether it relates to traffic in drugs, dynamite or intoxicating liquors. Whatever restraints and regulations each State chooses to exercise, it is as indispensable, I think, for the safety of the nation as it is for the safety of each State, that each State regulate for it-

self in relation to such matters; each State must govern itself, and must have its own different policies and social institutions; each should have the inherent right to take care of itself in respect of such regulations. "But, after all," he added, "we need not give ourselves any great uneasiness. Though the supreme court has in this respect, in my opinion, invaded the rights of the States, they are liable to review and revise their action, as they have often done before, and very wisely too."

NOTES OF RECENT DECISIONS.

SALE — PAYMENT BY CHECK — INNOCENT VENDEE—BILL OF LADING.—The case of National Bank of Commerce v. Chicago, B. & N. Ry. Co., 46 N. W. Rep. 342, presents two or three questions of considerable interest as to the effect of a payment on a conditional sale by means of a check, and also as to the effect of the issue of a bill of lading by a railway company, without receiving the goods named therein for transportation. It was laid down that a check on a bank is not payment, but is only so when the money is received on it; and there is no presumption that a creditor takes a check in absolute payment, arising from the mere fact that he accepts it from his debtor. Where goods are sold for cash on delivery, and payment is made by the purchaser by check on his banker, such payment is only conditional, and the delivery of the goods also only conditional; and if the check on due presentation is dishonored, the vendor may retake the goods, even from an innocent subvendee for value, unless he has been guilty of such negligence or laches as would equitably estop him from so doing. It was also held, in accordance with the decisions of the federal courts and the great weight of authority elsewhere, that a bill of lading issued by a station or shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier, even to an innocent consignee or indorsee for value, and that the carrier is not estopped by the statements in the bill from showing that no goods were in fact received for transportation. Mitchell, J., says:

It is not every kind of delivery that will deprive a vendor of the right to retake goods for non-payment of the purchase-money. Where goods are sold for cash, delivery and payment are concurrent conditions, and a delivery in expectation of immediate payment is conditional only; and if payment is not made as agreed, the vendor may reclaim the goods. Hence, the real question in these cases is, whether there was an unconditional delivery of the wheat to Moak & Co.; or, otherwise expressed, did the elevator company waive the condition of cash payment on delivery, or accept the check as absolute payment? It had the undoubted right to waive this condition, also to waive payment in cash and accept the check as unconditional payment; but we fail to find anything in the facts to support any such conclusion. Nothing is better settled than that a check is not payment, but is only so when the cash is received on it. There is no presumption that a creditor takes a check in payment arising from the mere fact that he accepts it from his debtor. The presumption is just the contrary. Where payment is made by check drawn by a debtor on his banker, this is merely a mode of making a cash payment, and not giving or accepting a security. Such payment is only conditional, or a means of obtaining the money. In one sense the holder of the check becomes the agent of the drawer to collect the money on it; and if it is dishonored there is no accord and satisfaction of the debt. 2 Pars. Cont. 623; Benj. Sales, § 731; Brown v. Leckie, 43 Ill. 497, Woodburn v. Woodburn, 115 Ill. 427, 5 N. E. Rep. 82; Cromwell v. Lovett, 1 Hall, 56. Where goods are sold for cash on delivery, and payment is made by the purchaser by check on his banker, such payment is only conditional, and the delivery of the goods also only conditional; and if the check on due presentation is dishonored, the vendor may retake the goods. Hodgson v. Barrett, 33 Ohio St. 63. Conceding, for the sake of argument, that there was in this case a constructive delivery of the wheat contemporaneously with the receipt of the check, there is an entire absence of evidence to rebut the presumption that it was only conditional upon the check being paid on presentation. Therefore, upon the dishonor of the check, the right of the elevator company to retake the wheat still continued in full force. * * * It seems to us perfectly clear that, at least up to the 17th, this wheat was in the actual possession and control of the elevator company, and that if there was any delivery of any kind to Moak & Co. on that day, on the receipt of their check, it was only conditional on the check being paid on presentation; and therefore when the check was dishonored the elevator company had an undoubted right to retake or retain the wheat, whichever it may be termed. It is urged that a different rule applies where intermediately the property has been purchased by an innocent subvendee for value. The general rule is that a title, like a stream, cannot rise higher than its source, and it is difficult to see how a person can communicate a better title than he himself has, unless some principle of equitable estoppel comes into operation against the person claiming under what would otherwise be the better title. We have found no case holding that any different rule obtains in cases like the present, as to a sub-vendee, than as to the original purchaser, except perhaps that as to the former a waiver of the condition, as for example, of payment on delivery, will be more readily inferred from the delivery, especially when the condition is not express but implied. See Benj. Sales (Amer. note), 269; Coggill v. Railway Co., 3 Gray, 545; Hirschorn v. Canney, 98 Mass. 150; Armour v.

Pecker, 123 Mass. 143. * * * It only remains to consider, in the Bank Cases, the effect of the bills of lading upon the liability of the railway companies to the bank, in case no wheat was in fact ever delivered to them for transportation. Of course if the wheat was delivered by the elevator company to Moak & Co., and by the latter to the railway companies for transportation, and the agent of the railway companies in good faith issued the bills of lading, the railway companies would not be liable, for it is always a good defense to a carrier, even against an innocent indorsee of the bill of lading, that the property was taken from its possession by one having a paramount title, as was the title of the elevator company in this case as unpaid vendor. A carrier, in issuing a bill of lading for property delivered to him for transportation, does not warrant the title of the shipper. But what is the rule where no property was ever delivered at all for transportation, and the agent of the carrier, either fraudulently or through mistake or negligence, issues a false bill of lading, which passes into the hands of a *bona fide* consignee or indorsee for value? There is an unbroken line of authorities in England that, even as against a *bona fide* consignee or indorsee for value, the carrier is not estopped by the statements of the bill of lading, issued by his agent, from showing that no goods were in fact received for transportation. Grant v. Norway, 10 C. B. 665; Coleman v. Riches, 16 C. B. 104; Hubbersty v. Ward, 8 Exch. 330; Brown v. Coal Co., L. R. 10 C. P. 562; McLean v. Fleming, L. R. 2 H. L. Sc. 128; Cox v. Bruce, 18 Q. B. Div. 147; Meyer v. Dresser, 16 C. B. (N. S.) 646; Jessel v. Bath, L. R. 2 Exch. 367. And this has not been at all changed by the "bills of lading act" (18 & 19 Vict. ch. 111, § 3.) It is also the settled doctrine of the federal courts. The Freeman v. Buckingham, 18 How. 182; The Lady Franklin, 8 Wall. 325; Pollard v. Vinton, 105 U. S. 7; Railway Co. v. Knight, 122 U. S. 79. 7 Sup. Ct. Rep. 1132; Friedlander v. Railway Co., 130 U. S. 416, 8 Sup. Ct. Rep. 570. What was said on the subject in The Freeman v. Buckingham was probably *obiter*, for in that case it was sought to hold the interests of the general owner in a ship liable on a bill of lading issued by the special owner, who was not the agent of the former. But what is there said is important both as being the utterance of so eminent a jurist as Curtis, J., and also because so often quoted with approval by the same court in subsequent cases. The case of The Lady Franklin did not involve the question of a *bona fide* purchaser, but is important as announcing that the principle is the same, whether the false bill of lading is issued fraudulently or by mistake. But, in view of the later cases cited above, there is no room to doubt that that court is firmly committed to the doctrine in its broadest scope. The same rule obtains in Massachusetts, Maryland, Louisiana, Missouri, North Carolina and apparently Ohio. Sears v. Wingate, 3 Allen, 103; Railway Co. v. Wilkens, 44 Md. 11; Fellows v. The Powell, 16 La. Ann. 316; Hunt v. Railway Co., 29 La. Ann. 446; Bank v. Laveille, 52 Mo. 380; Williams v. Railway Co., 93 N. C. 42. Dean v. King, 22 Ohio St. 118. The text-writers all agree that the overwhelming weight of authority is on this side. See 38 Amer. Dec. 410, (note to Chandler v. Sprague). The reasoning by which this doctrine is usually supported is that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for goods it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; that it is not within the scope of the authority of the shipping agent of a carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; that his real and apparent authority—*i. e.*, the power with which his principal has clothed him in the character in which he is held out to the world—is the same, viz., to give bills of lading for goods received for transportation; and that this limitation upon his authority is known to the commercial world, and therefore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill, the rule being that, if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event, or the happening of the contingency, or the performance of the condition, must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority. An examination of the authorities also shows that they apply the same principle whether the bill was issued fraudulently and collusively or merely by mistake. The only States that we have found in which a contrary rule has been adopted are New York, Kansas, Nebraska, apparently Illinois, and perhaps Pennsylvania. Armour v. Railway Co., 65 N. Y. 111; Bank of Batavia v. New York, etc. R. Co., 106 N. Y. 195, 12 N. E. Rep. 433; Sioux City, etc. R. Co. v. First Nat. Bank, 10 Neb. 556, 7 N. W. Rep. 311; Railroad Co. v. Larned, 103 Ill. 293; Brooke v. Railroad Co., 108 Pa. St. 529, 1 Atl. Rep. 206. The reasoning of these cases is in substance that the question does not at all depend upon the negotiability of bills of lading, but upon the principle of estoppel *in pais;* that where a principal has clothed an agent with power to do an act in case of the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact, to the prejudice of a third person, who has dealt with the agent or acted on his representation in good faith in the ordinary course of business. This rule this court in effect adopted and applied in McCord v. Telegraph Co., 39 Minn. 181, 39 N. W. Rep. 315, 318. It is urged that force is added to this reasoning in view of the fact that bills of lading are viewed and dealt with by the commercial world as *quasi* negotiable, and consequently it is desirable that they should be viewed with confidence and not distrust; and that for these considerations it is better to cast the risk of the goods not having been shipped upon the carrier, who has placed it in the power of agents of his own choosing to make these representations, rather than upon the innocent consignee or indorsee, who, as a rule, has no means of ascertaining the fact. If the question was *res integra* we confess that it seems to us that this argument would be very cogent. But on the other hand, it may be said that carriers are not in the business of issuing and dealing in bills of lading in the same sense in which bankers issue and deal in bills of exchange; that their business is transportin property, and that if the statements in the receipt part of bills of lading issued by any of their numerou station or local agents is to be held conclusive upon

them, although false, it would open so wide a door for fraud and collusion that the disastrous consequences to the carrier would far outweigh the inconvenience resulting to the commercial world from the opposite rule. It is also to be admitted that it requires some temerity to attack either the policy or the soundness of a rule which seems to have stood the test of experience, which has been approved by so many eminent courts, and under which the most successful commercial nation in the world has developed and conducted her vast commerce ever since the inception of carriers' bills of lading. But on questions of commercial law it is eminently desirable that there be uniformity. It is even more important that the rule be uniform and certain than that it be the best one that might be adopted. Moreover, on questions of general commercial law the federal courts refuse to follow the decisions of the State courts, and determine the law according to their own views of what it is. It is therefore very desirable that on such questions the State courts should conform to the doctrine of the federal courts. The inconvenience and confusion which would follow from having two conflicting rules on the same question in the same State, one in the federal courts and another in the State courts, is of itself almost a sufficient reason why we should adopt the doctrine of the federal courts on this question. To do otherwise, so long as the jurisdiction of those courts so largely depends on the citizenship of suitors, would really result in discrimination against our own citizens. In deference, therefore, to the overwhelming weight of authority, but without committing ourselves to all the reasoning of the decided cases on the subject of the law of agency, we deem it best to hold that a bill of lading issued by a station or shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier, even to an innocent consignee or indorsee for value.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS —CONFLICT OF LAW—FOREIGN CORPORATION. —We note in the Ohio *Weekly Law Bulletin*, of date October 20, an interesting and valuable opinion rendered by Judge Saffin, of the Franklin County, Ohio, Probate Court, on the subject of the right of a foreign corporation to make a general assignment under the laws of Ohio, which would be invalid under the law of the State wherein it was created. The precise adjudication, as appears from the syllabus prepared by the editor of that journal, is, that a manufacturing corporation chartered in New York to own property and transact business in Ohio, may, when insolvent by a deed executed in New York, make a general assignment for the benefit of creditors, which is valid to pass its real and personal property situated in Ohio to an assignee, notwithstanding the fact that after it was chartered and entered upon its property and business in Ohio, a New York statute was enacted which in terms prohibited such corporations from making such assignment "in contemplation of insolvency." Judge Saffin, in the course of an exhaustive opinion, unfortunately too long for publication entire, says:

It is conceded in argument that the statutes of New York can have no extraterritorial effect of their own force. It is only by the operation of the principle of interstate comity that the laws of a State are recognized beyond its territorial limits.

Comity, it seems, is interstate courtesy; it is interstate politeness; it is a disposition between the States to be neighborly; but there is no principle of comity that can give force to the law of another State to the prejudice of the rights of our citizens or in contravention of the policy of our State. It is certainly competent for any State to adopt laws to protect its own property as well as to regulate it, and "no State will suffer the laws of another to interfere with her own; and in the conflict of laws, when it must often be a matter of doubt which shall prevail, the court which decides will prefer the laws of its own country to that of strangers." Smith v. McAtee, 92 Am. Dec. 645; Story's Con. of Laws, sec. 28.

It seems to me, and the conviction is quite strong, that to give effect here to the law passed in New York in 1884, taking away from corporations the power to make general assignments, would seriously contravene the policy of our law. The right of corporations, when insolvent, to assign their property for the benefit of creditors, is expressly recognized by our statutes, sec. 6335. It has long been the recognized law of our State that the most equitable and just thing a failing debtor can do is to turn out his property for the benefit of all creditors alike. It was held by the Supreme Court of our State in Rouse v. The Bank, 46 Ohio St. 493, that corporations when insolvent, have no power to make preferences in the disposition of their property. It is true that this case dealt with a domestic corporation but it is nevertheless an established principle of our law, that corporations as well as natural persons, when in an insolvent condition, should dispose of all their property equally and equitably among their creditors. To prohibit corporations in Ohio from making general assignments would be to leave them and their property a prey to what we call vigilant creditors that is, creditors could seize the property of the corporation and sacrifice it by judicial sale, little by little, to the serious prejudice of the general creditors. It is well settled that one State cannot dissolve and thus close up the affairs of a foreign corporation. 5th Am. Corp. Cas. p. 217 and cases cited. This would be granting, indeed, privileges and immunities to foreign corporations doing business and owning property in our State which are not accorded to corporations created within it.

It is evident that this assignment, although made in the State of New York, was made in the expectation, and in no other, that it was to be executed and the trusts thereof administered in the State of Ohio.

We are dealing with land situated in Ohio. It was held in Richardson v. Rogers, 45 Mich. 561 (cited 78 Am. Dec. 597), that an assignment executed in one State, but with express reference to another, in which it is intended to have its first operation, it is to be treated, in passing upon its validity, as if executed in the latter State. It was held, also, in Warner v. Jaffray, 96 N. Y. 248, that where a voluntary assignment made for the benefit of creditors was made in New York by a resident of that State, its validity and effect

as to property situated in the State of Pennsylvania would have to be governed by the laws of the latter State.

It seems, also, to be well settled as the law of Ohio that in all proceedings for the transfer of title to real estate the law of Ohio is to govern. 2 Ohio, 235; 9 Ohio, 183. This principle is illustrated by the case of the American Bible Society v. Marshall, 15 Ohio St. 537. A testator in Ohio devised lands to the Bible Society, which was a corporation organized under the laws of New York. No capacity was expressly given to it by statute in New York to take real estate by devise. The property devised was situated in Ohio. A general law of New York at the time the Bible Society was incorporated provided that: "No devise of real estate to a corporation shall be valid unless such corporation be *expressly authorized* by its charter or by statute to take by devise." Our Supreme Court held, however, that this statute was operative only to the extent of disabling a corporation from taking by devise real estate situate in the State of New York, and did not affect its power to take by devise real estate in Ohio. * * *

The case of Ewing v. The Bank, 43 Ohio St. 31, is relied upon as sustaining the view contended for by Lee. In that case a corporation created under the laws of Ohio was prohibited from taking interest above 8 per cent.; it went into the State of Illinois, where 10 per cent. was lawful, and there made a contract providing for paying interest at the rate of 10 per cent. The contract was sought to be enforced in Ohio. It was held the company could make no contract, and do no act within or without the State which was prohibited by its charter.

When this case was first presented to me in argument, it seemed to furnish strong support for the proposition contended for by Lee. But I think it is successfully answered by two considerations: First: The contract was sought to be enforced in Ohio. There is a strong intimation in the case, that if an attempt had been made to enforce the contract in Illinois, the conclusion might have been different; but, however that may be, I am satisfied that the question cannot be resolved upon the assumption that we are here dealing with contracts. That we must look to the laws of the State creating a corporation, for its powers, is conceded as a general principle. But this rule must always yield to demand of local policy when dealing with foreign corporations.

GIFTS—IN CONTEMPLATION OF MARRIAGE.—The Supreme Court of Vermont, in Williamson v. Johnson, 20 Atl. Rep. 279, consider a question of interest to prospective bridegrooms, as to whether a gift in contemplation of marriage is conditional and revocable, holding that where plaintiff gives to defendant, who is under engagement to marry him, certain sums of money to buy clothes in contemplation of such marriage, and to travel from her home to his to be married, with no expectation that the money will be refunded, the gift is nevertheless a conditional one, and when she refuses to fulfill the engagement he may recover back the money, though part of it was actually spent in the purchase of clothes. Tyler, J., says:

It is a general rule of law that a gift by a competent party made perfect by a delivery and acceptance is irrevocable by the donor; that to constitute a gift *inter vivos* the donor must deliver the property, and part with all present and future dominion over it. It is a voluntary, gratuitous transfer of personal property by one person to another. A true and proper gift or grant is always accompanied by delivery of possession, and takes effect immediately; as, if A gives to B £100, or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee, and it is not in the donor's power to retract it, though he did it without any consideration or recompense, unless he were under a legal incapacity—as infancy, coverture, duress or the like—or if he were drawn in, circumvented, or imposed upon by false pretenses, ebriety, or surprise. 2 Bl., Comm. 441. In accordance with this rule it was held in Stauffer v. Morgan, 39 La. Ann. 632, 2 South. Rep. 98, that a donation by a man to his intended wife, on the eve of their marriage, of a check on a banking firm was revocable at any time before actual collection by the donee; but, after it had been presented and honored by placing the amount to her individual credit, the donation was complete; that the *locus pœnitentiæ* continued until the delivery was perfected. In the note to Drew v. Hagerty (Me.), 3 Lawy. Rep. Ann. 230, 17 Atl. Rep. 63, it is said that, in order to render a gift of money by a grandmother to certain children and their father as their trustee effectual for any purpose, it is not only necessary to show an intention to give, but also an actual delivery of the thing given. There must be a parting with the possession and all control over the property, and a vesting of the possession in the donee or in a third person in trust for the donee. A gift of personal property made with intent to take effect immediately and irrevocably, and executed by complete and unconditional delivery, is binding upon the donor as a gift *inter vivos*. Love v. Francis, 29 N. W. Rep. 843, 6 Amer. St. Rep. 290, and note. See, also, *In re* Crawford, 113 N. Y. 560, 21 N. E. Rep. 692.

All the definitions come to this: That to constitute a valid gift it must be voluntary, gratuitous, and absolute. Applying these tests to the facts relative to the gift of the $55, it is apparent that they fall short of showing a perfected gift of that money in the donee. The court below found the facts that the plaintiff let the defendant Caroline have both sums of money without any expectation that they would be refunded, which was certainly quite natural in the circumstances of the case; that both sums were intended as gifts; and that no conditions were attached thereto. It is further found that the gifts were made in the expectation by both parties of marriage, and that they were given for specific purposes, the $275 for the purchase of the defendant's marriage wardrobe, and the $55 to defray her expenses in coming to this State to be married. The court would have fully complied with the requirements of the act of 1888 if it had stated the facts in the case without denominating the transaction. That act requires that "in all cases hereafter tried in the county court where any question of fact shall be tried by the court instead of by a jury, and in which a jury trial might have been had by either party, before any bill of exceptions shall be allowed, the facts found by the court upon which judgment is rendered shall be reduced to writing, and signed by a majority of the members of the court and filed with the clerk." If the plaintiff had given or sent these sums of money to the defendant without any direction or

designation as to their use, as gratuities, they would have been perfected, irrevocable gifts upon delivery. In a general sense they were gifts, but in a strict legal sense they were not gifts, though called so by the court, for the reason that they were made in expectation and under an arrangement that they were for specific purposes. The law is well settled that where money is delivered by one person to another for a particular purpose, to which the latter refuses to apply it, the depositor may recover it back in an action for money had and received. 2 Greenl. Ev. § 119; De Bernales v. Fuller, 14 East, 590, note.

In a valuable note to Hasser v. Wallis, 1 Salk. 28, it is said: "If one man takes another's money to do a thing, and refuses to do it, it is a fraud, and it is at the election of the party injured either to affirm the agreement by bringing an action for the non-performance of it, or to disaffirm the agreement *ab initio*, by reason of the fraud, and bring an action for money had and received to his use."

In Berry v. Berry, 31 Iowa, 415, a father gave to his son certain personal property upon the condition that he should keep sober and attend to his business. It was held that to entitle the donee to claim that the gift was irrevocable and invested him with a right to the property it must be shown that he had complied with the conditions on which the gift was made. And in Stewart v. Phy, 11 Oreg, 335, 3 Pac. Rep. 443, it was held that *assumpsit* for money had and received would lie to recover money paid by a debtor to his creditor to be applied in satisfaction of a particular obligation, when it was not so applied, and the obligation was otherwise discharged.

Several English cases cited by the plaintiff's counsel go beyond the rule above indicated, and hold that marriage gifts or their value are generally recoverable of the donee after breach of the engagement by her. See Fonbl. Eq. bk. 1, c. 6, § 15; Young v. Burrell, Cary, 77; Robinson v. Cumming, 2 Ark. 409.

PHOTOGRAPHS AS INSTRUMENTS OF EVIDENCE.

The uses of the photographic art have become as varied, almost, as the wants of man. In the business world, in science and in art, its usefulness is recognized and enjoyed. By its wonderful power the astronomer records the aspect of the moon, and the eclipses of the sun, and secures representations of the planets and the configurations of the stars. It records the temperature and pressure of the air, the variations of terrestrial magnetism and the motions of the atmosphere. It portrays the arrangement of the clouds and enables us to study the structure of the cyclone. It fixes the enormously magnified images of the microscope and furnishes memoranda for the artist. To it the explorer commits the interesting sights of his travels to be reproduced, by another adaptation of the art, as illustrations of the printed record of his travels.

There is, however, another use of this art, one equally important with any that have been mentioned and that is its use in the administration of justice. The value of photographs to the executive officers of the law in the pursuit and detection of criminals has long been known. Their value as evidence in the court room is equally important and well-established. In less than twenty years after Daguerre first made public the important results of his experiments, the art of photography had been so far developed that the Supreme Court of the United States acknowledged its usefulness as an aid to judicial research and the fidelity with which it depicted the objects exposed to its power.[1] Since then the use of photographs as means of evidence has become quite general, and has received the approval of courts of this country and of England.

Photographs are either secondary or demonstrative evidence, according to the method of their nse. As secondary evidence they are subject to all the rules applicable to such evidence. They can only be used in the absence of the originals and the inability to produce the original must be shown in the customary manner to the satisfaction of the court, before the photographic copy can be used.[2]

As demonstrative evidence, photographs are competent whenever it is important that the *locus in quo*, or any object, person or thing be described to the jury.[3] They are, as such evidence, admissible as aids in the investigation, as much as a map or other diagram, and serve in like manner to explain or illustrate and apply the testimony. They are useful to enable courts and juries to comprehend readily the question in dispute as affected by evidence.[4] As the value of the photograph, as evidence depends upon its accuracy,[5] it must be shown by extrinsic evidence to be a faithful representation of the subject.[6]

[1] Luco v. U. S., 23 How. 515 (1859).

[2] Duffin v. People, 107 Ill. 113 (1883); Maclearn v. Scripps, 52 Mich. 245 (1883).

[3] Barker v. Town of Perry, 67 Ia. 146 (1885); Cowley v. People, 83 N. Y. 478 (1881); *In re* Foster's Will, 34 Mich. 21 (1876).

[4] Archer v. N. Y. etc. R. Co., 106 N. Y. 589 (1887); Cowley v. People. *Id;* K. Cy., M. & B. R. R. Co. v. Smith, 8 South. Rep. 43 (Ala. 1890).

[5] Verran v. Baird, 23 N. E. 630 (Mass. 1890); Marcy v. Barnes, 16 Gray, 163 (1860); Archer v. N. Y. etc. R. Co., *Id.*

[6] Blair v. Pelham, 118 Mass. 420 (1879); Locke v. R.

Whether it is sufficiently verified and whether material to the issue, are preliminary questions to be decided by the judge presiding at the trial and not open to objection or revision.[7] The photograph may be shown to be correct by the testimony of the photographer who took it,[8] or by the testimony of any person acquainted with the subject represented.[9]

It has been held that the preliminary investigation should include the refractive power of the lens, the angle at which the original to be copied was held to the sensitive plate, the accuracy of the focussing, the skill of the operator, and the method of precedure,[10] but such strictness of proof is rarely necessary or required. In accident or damage cases, the picture should be taken while the scene of the accident or premises damaged are in the same condition as when the accident or damage occurred, but any difference that arises from the view being taken at a different season of the year can be explained.[11] Objections to the competency of a witness to testify to the correctness of the photograph must be made in the trial court and cannot be raised for the first time in the upper court.[12]

The weight to be given a photograph as evidence is a question to be determined by the jury.[13] It has been held proper to permit the jury to take the photograph to the jury-room with them[14] and to study the picture with a magnifying glass.[15]

The extent of the use of photographs and the manner and purpose of their employment is best shown by the reported cases, to a synopsis of which the remainder of this article is devoted. Photographic views of the scene of an accident are admissible in evidence as a correct representation of the place.[16] In a suit of a widow of a railroad engineer against the company to recover damages for the death of her husband in a wreck caused by a broken bridge, the plaintiff was permitted to introduce a photograph of the wreck, broken bridge and stream where the accident occurred. It was competent testimony "for the reason that the jury, if it was possible for them so to do, would have been permitted to have viewed and inspected the same for the purpose of more readily understanding and properly applying the other evidence, and that in such case there could be no more satisfactory evidence than a correct photograph."[17]

Where the plaintiff was injured at a depot by being struck by a passing train, it was held proper to admit a photograph of the place of the accident, the court saying: "If a fair representation of the premises it was admissible as an aid in the investigation, as much as a map or other diagram, and served in like manner to explain or illustrate and apply the testimony. Such drawings are uniformly received and are useful, if not indispensable to enable courts and juries to comprehend readily the question in dispute as affected by the evidence.[18] Photographs of a railroad crossing at which an accident occurred are admissible.[19]

In actions against municipal corporations for injuries received upon defective sidewalks or streets photographs of the defective walk or street are proper evidence.[20] "They are used to identify the objects to which evidence relates, and being an exact reproduction of the object or thing represented, they are much more satisfactory evidence of the appearance of the thing represented than can be conveyed to the mind by any description given by a witness."[21]

Photographs of premises showing the condition in which they are left by a change of street grade, are useful and proper aids to enable the jury in a suit for damages for the change, to understand and apply the evi-

R. Co., 46 Ia. 109 (1877); Reddin v. Gates, 52 Ia. 210 (1879); Alberti v. N. Y. etc. R. Co., 118 N. Y. 77 (1889); Schaible v. Wash. L. I. Co., 9 Phila. 136 (1873); Cowley v. People, *Id.*

[7] Blair v. Pelham, 118 Mass. 420.

[8] Blair v. Pelham, *Id.*; Reddin v. Gates, *Id.*; Cowley v. People, 83 N. Y. 476; K. Cy., M. & B. R. R. Co. v. Smith, *Id.*

[9] Schaible v. Wash. L. I. Co., *Id.*; Locke v. R. R. Co., *Id.*; Howard v. Russell, 12 S. W. 525 (Tex. 1889); Church v. Milwaukee, 31 Wis. 512 (1872); Leathers v. Salvers Co., 2 Woods, 682 (1875).

[10] Taylor Will Case, 10 Abb. Pr. N. S. (N. Y. 1871).

[11] Dyson v. N. Y. & N. E. R. Co., 57 Conn. 9 (1889).

[12] Locke v. R. R. Co., 46 Ia. 109.

[13] Ruloff v. People, 45 N. Y. 213 (1871); Ayers v. Harris, 13 S. W. 768 (Tex. 1890); Reddin v. Gates, *Id.*

[14] Barker v. Town of Perry, 67 Ia. 146.

[15] Barker v. Town of Perry, *Id.*

[16] Dyson v. N. Y. & N. E. R. Co., 57 Conn. 9; K. Cy., M. & B. R. R. Co. v. Smith, *Id.*

[17] Locke v. R. R. Co., 46 Ia. 109.

[18] Archer v. N. Y. R. Co., 106 N. Y. 589.

[19] Dyson v. N. Y. & N. E. R. Co., 57 Conn. 9.

[20] Blair v. Pelham, 118 Mass. 420.

[21] Barker v. Town of Perry, 67 Ia. 146.

dence.[22] Stereoscopic views of premises injured by water, taken the day of the injury, are competent evidence to show the condition of the property after the injury, for the purpose of establishing the amount of damage done thereto.[23] Photographs of dangerous premises are competent. Testimony of localities can generally be better understood by views and observation than by word of mouth, and changes can just as well be explained in the one case as in the other.[24]

In actions for damages to real estate by trespass, photographs of the premises taken at the time they were in the condition in which they were put by defendant, are admissible.[25] The fact that the photograph does not show every part of the ground does not require its exclusion.[26] The case of Hollenbeck v. Rowley, 8 Allen, 473 (1864), is sometimes cited as opposed to the doctrine of the last cases cited, but there is in reality no conflict. The latter case was an action for damages for trespass to land within the limits of a highway by putting rocks and rubbish thereon. The defendant offered a photographic view of the premises in controversy without the testimony of the photographer who took it, but he offered to prove its correctness by persons well acquainted with the premises. The photograph was offered to be used as a "chalk representation" of the premises. The plaintiff objected, especially on the ground that it exhibited but part of the premises, and it was excluded. The supreme court said: "The rejection of the photographic view of the premises is not a ground for exception. It was not verified by the oath of the photographer, and was only offered as a "chalk representation" of the premises, as such, it was in the discretion of the presiding judge, in view of its imperfections, or want of fullness of description, as well as its immateriality in reference to the understanding of the case on trial, to admit or reject it." This decision leaves the matter entirely in the discretion of the trial judge. In this connection it may be noted as a curious fact that in all cases decided by courts of last resort on this subject the decisions have sustained the ruling of the trial judge.

In a later case decided by the Supreme Court of Massachusetts, where the action was for damages caused to real estate by the breaking of a dam, a photograph of a gorge about half-way between the dam and plaintiff's property, was offered to show the force and effect of the water escaping from the dam, but was rejected by the trial judge. His ruling was sustained because no proof had been offered to show how much of the gorge represented was caused by the flood, and how much was there before nor of other facts necessary to make the gorge a measure of the volume and force of the water which escaped from the dam. "The photograph was not necessarily instructive, and if not practically instructive not competent." Here the chief ground of rejection seems to have been the failure of preliminary proof.[27]

Where plaintiff was injured upon a street car, a photograph of another street car is not competent evidence, even though it can be shown that the two cars are exactly alike.[28] In an action for personal injuries, it is competent to introduce a photograph showing the manner in which plaintiff's limbs had been contracted.[29] And in an action for an assault and battery the plaintiff may introduce a photograph taken shortly after the battery and showing the extent of his injuries.[30] The photographer's art is of great value in cases of disputed signatures or where the genuineness of documents or the identification of handwriting is at issue.

Photographic copies, either enlarged or of the natural size, of the disputed signature and of those admitted to be genuine, may be of great assistance to a jury in comparing and examining the different specimens of one handwriting. Characteristics of it may be brought out and made clear by the aid of a photograph or magnifying glass, which would not be discernible by the naked eye.[3] But photographic copies of a signature are not admissible to aid an expert as a basis of opinion as to the genuineness of the original

[22] Church v. Milwaukee, 31 Wis. (1872).
[23] The German Theo. School v. Dubuque, 64 Ia. 736 (1883).
[24] Bedell v. Berkey, 43 N. W. 308 (Mich. 1889).
[25] Cozzens v. Higgins, 1 Abb. Ct. App. Dec. 451 (N. Y. 1866).
[26] Chestnut Hill Co. v. Piper etc. Co., 15 Weekly Notes, 55.
[27] Verran v. Baird, 23 N. E. 630.
[28] R. R. Co. v. Green, 56 Md. 84 (1880).
[29] Alberti v. N. Y. etc. R. Co., 118 N. Y. 77.
[30] Reddin v. Gates, 52 Ia. 210.
[31] Rowell v. Fuller, 59 Vt. 695 (1887); Marcy v. Barnes, 16 Gray, 163.

signature. Opinions of those acquainted with the handwriting in question formed from an examination of photographic copies of the signature or writing are entitled to but little weight.[32] Nor will an expert be allowed to testify as to the genuineness of a signature, from comparison with photographic copies when the originals are not in court.[33] And a disputed signature cannot be compared with photographic copies of other signatures admitted to be genuine, for the purpose of proving forgery.[34] The witness should exercise his acumen upon the thing itself which is to be the basis of his judgment.[35] Where the originals are in court it is not proper to introduce photographic copies. In such case they would be additional and supplemental proof, neither necessary nor admissible before, and at best merely convenient aids to enable the jury to dispensed with the use of the originals.[36] But the camera may be employed as a magnifying glass as, where in a dispute as to a figure in a note, enlarged photographic copies of the note were introduced to help the jury to decide whether the figure was a one or not.[37] And in a case in New York, where the issue was whether the certification of a check purporting to have been made by the teller of the bank on which it was drawn, was genuine or not, the judge permitted the court room to be darkened and an expert with the aid of a calcium magic lantern threw an image from a photographic negative of the check in question upon the wall, to show that the writing was free and flowing and not the labored and re-touched signature usual in forgeries, and which some of the experts insisted appeared in this case. The exhibit seems to have had the desired effect, as the jury found that the signature was genuine.[38]

Photographic copies of documents in public archives and beyond the jurisdiction of the court have been admitted in evidence,[39] and the signatures attached compared with signatures of the same person attached to documents in evidence.[40] But photographic copies of notes cannot be sent to another State attached to interrogatories and commission to take deposition and the copies submitted to witnesses who were acquainted with the handwriting of the person who was alleged to have executed the notes, for the purpose of proving by the witnesses that the notes were executed by such person.[41]

In the celebrated Tichborne case in England some years ago, photographs of letters and documents were used to facilitate the comparison of handwriting and for the purpose of identifying the writing.

Field notes of a survey in the general land office were attached to the depositions of clerks in the land office and admitted in evidence as part of the depositions to show what the notes were.[42] The Supreme Court of the United States at an early date expressed its approval of the use of photographic copies for the comparison of handwriting.[43]

The photograph of a document or paper is not admissible from which to prove its forgery, at least not when the original is attainable.[44] But a photographic copy of a forged note is admissible in evidence, where the original has so faded as to become illegible, on proof that it is an exact copy of the words of the original, when it is not offered to prove the handwriting of the signature, but merely the words of the note.[45]

Papers and documents on file in court have been permitted to be removed and their places supplied, under the direction of the clerk by photographic copies.[46] Pictures of the putative father and of the illegitimate child, are admissible in evidence for the purpose of showing resemblance between the two, but since great dissimilarity between kindred and strong resemblance between strangers are so common, photographs so used are entitled to but little weight.[47]

In an action for dower where the marriage was denied, witnesses who were present at the wedding of plaintiff, were shown photographs of the alleged husband and permitted

[32] Taylor Will Case, 10 Abb. Pr. (N. S.) 301.
[33] Hynes v. McDermott, 82 N. Y. 42.
[34] Town v. R. R. Co., 39 Md. 93.
[35] Hynes v. McDermott, 82 N. Y. 42.
[36] Foster Will Case, 34 Mich. 21; Maclearn v. Scripps, 52 Mich. 245.
[37] Arthur v. Roberte, 60 Barb. 580 (N. Y. 1871).
[38] Albany Law Jr. Vol. 13, 407 (1876).
[39] Leathers v. Salvors Wrecking Co., 2 Woods, 682.
[40] Howard v. Russell, 12 S. W. 525 (Tex. 1889).
[41] Eborn v. Zimpleman, 47 Tex. 502.
[42] Ayers v. Harris, 13 S. W. 768 (Tex. 1890).
[43] Luco v. U. S., 23 How. 515.
[44] U. S. v. Messman, U. S. D. C. So. D. N. Y.
[45] Duffin v. People, 107 Ill. 113.
[46] Daly v. McGuire, 6 Blatch. 137 (1868).
[47] *Re* Jessup Estate, 81 Cal. 408 (1889).

to testify that the photographs represented the man to whom plaintiff was married in their presence.[48] The apparent bodily health or condition of a person at the time of effecting insurance may, in a suit on the policy, be shown to the jury by means of photographs taken about the time insurance was effected.[49]

The use of photographs as evidence extends to criminal cases as well as civil. In a recent case of manslaughter tried in New York, the defendant was charged with criminal negligence in the erection of a building which had fallen and killed several persons. To prove the unsafe and negligent construction of the building, the State was permitted to introduce a photograph of the premises showing the condition of the walls as they were as soon as the structure fell. "It exhibited the surface condition of the walls and, no doubt, carried to the minds of the jurors a better image of the subject-matter concerning which negligence was charged, than any oral description by eye-witnesses could have done.[50]

In homicide cases, a photograph of the deceased is admissible in evidence to aid in identifying the deceased as the person seen with the defendant at a certain time and as the person testified to by various witnesses,[51] or to prove the identity of the murdered man with a person who had disappeared,[52] or to prove the identity of a certain person with the murdered man.[53]

In a case tried some years ago in New York, three persons had attempted to burglarize a store. They were discovered, and in the effort to capture them a clerk was killed by one of the burglars. A day or two afterwards the bodies of two men were taken from the river near by and the defendant was arrested in the neighborhood. On his trial for the murder of the clerk; it was alleged that the defendant and the dead men comprised the party of burglars and had been associated together. To assist in identifying the bodies and connecting the defendant with them when alive, photographs of the dead men taken after death, were submitted to the jury, and witnesses, relatives and acquaintances of the dead men were permitted to give their opinion as to their identity.[54] Where a witness who had seen the body of the deceased, testified that he had seen the same man the previous evening at a certain place, and selected a photograph of the deceased's brother, as resembling the deceased, it was held competent for the State, in rebuttal, to introduce a correct photograph of the deceased, as the resemblance between the two brothers would have a material bearing upon the weight to be given to the testimony of the witness.[55]

On the trial of a person indicted for willfully neglecting to provide a child in his care and custody with proper and sufficient food, clothing and medicine, picture of the child before he went into the care of defendant, and also pictures taken shortly after he was taken from defendant's custody, are proper for the purpose of showing the emaciation of the child.[56] Photographs of the place where a homicide was committed are admissible if taken before any material change has occurred.[57] A photograph of the locality where a murder occurred, taken before the trial with persons placed where defendant and his accomplices were said to have stood, has been held not incompetent as tending to influence the jury. The court seems to have questioned the propriety of this use however, and as the case was reversed on other grounds, recommended the State to support the photograph by evidence showing that the defendant occupied the position as shown in the photograph.[58] Where the offense charged is selling obscene photographs, the photographs themselves may be submitted to the jury.[59]

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[48] Wilcox v. Wilcox, 46 Hun, 32 (N. Y. 1887).
[49] Schaible v. Wash. L. I. Co., 9 Phila. 136.
[50] People v. Buddenseick, 103 N. Y. 500.
[51] Marion v. State, 20 Neb. 233 (1886).
[52] Udderzook Case, 76 Pa. St. 340.
[53] Luke v. Calhoun Co., 52 Ala. 115.
[54] Ruloff v. People, 45 N. Y. 213.
[55] State v. Holden, 44 N. W. Rep. 123 (Minn. 1890).
[56] Cowley v. People, 83 N. Y. 476.
[57] Keyes v. State, 23 N. E. Rep. 1097 (Ind. 1890).
[58] Shaw v. State, 9 S. E. Rep. 768 (Ga. 1889).
[59] People v. Muller, 32 Hun, 209 (884).

ACCIDENT INSURANCE — CONSTRUCTION OF POLICY—DEATH BY ACCIDENTAL POISONING.

HEALEY V. MUTUAL ACC. ASS'N.

Supreme Court of Illinois, June 12, 1890.

1. *Accident Insurance—Construction of Policy.*—A policy of accident insurance is intended to furnish indemnity against accidents and death caused by accidental means, and the language of the policy must be construed with reference to that purpose. In case of doubt or uncertainty in the terms of the policy the construction should be liberal in favor of the insured.

2. *Same—Death by Accidental Poisoning.*—Death from accidentally taking poison creates a liability upon a policy insuring against death by "external, violent, and accidental means."

Action by Emma T. Healey against the Mutual Accident Association of the Northwest upon a certificate of membership in favor of her deceased husband, John Healey, by which he was insured against death occasioned by "external, violent, and accidental means." The circuit court gave judgment for defendant on demurrer to the declaration, and the appellate court affirmed the judgment. Plaintiff appeals.

CRAIG, J.: The question presented, although one of pleading, involves a construction of the policy upon which the action was brought; and in placing a construction on the contract, and in arriving at the intention of the contracting parties, regard must be had to the object and purpose which was intended by the contracting parties. A policy of accident insurance is issued and accepted for the purpose of furnishing indemnity against accidents and death caused by accidental means, and the language of the policy must be construed with reference to the subject to which it is applied. Insurance Co. v. Nelson, 65 Ill. 420. Thus a provision in a policy against loss by fire avoiding the policy if the property becomes incumbered has been held not to include incumbrance by judgment, although within the terms used. Baley v. Insurance Co., 80 N. Y. 21. Again, policies of insurance being signed by the insurer, the language employed being that of the insurer, the provisions of the policy are usually construed most favorably for the insured in case of doubt or uncertainty in its terms. Insurance Co. v. Scammon, 100 Ill. 644. "No rule in the interpretation of a policy is more fully established or more imperative and controlling than that which declares that in all cases it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity, which in making the insurance it was his object to secure. When the words are without violence susceptible of two interpretations, that which will sustain his claim and cover the loss must, in preference, be adopted." May, Ins. (2d ed.) § 175.

Keeping in view these well-settled rules of construction, the question to be determined is whether the death in this case is one falling within the spirit of the policy. The death of John Healey, the assured, is a conceded fact, but it is said the policy is an assurance against death by external, violent, and accidental means, and that death did not ensue from external, violent, and accidental means within the meaning of the policy. Under the averments of the first and second counts it is manifest that death ensued by accidental means, as it it is expressly averred that death was produced by accidentally taking and drinking poison. The demurrer admits this averment of the declaration, and the fact that death ensued from accidental means stands admitted by the record. But to bring the case within the terms of the policy it devolved upon the plaintiff to aver and establish not only that death ensued from accidental means, but also from external and violent means. The next inquiry, therefore, to be determined is whether within the meaning of the policy death resulted from external and violent means. While the authorities in cases similar to the case before us are not entirely harmonious, yet we think that the decided weight of authority is in support of the view that death in this case was caused by external and violent means. In McGlinchey v. Casualty Co., 80 Me. 251, 14 Atl. Rep. 13, the insured was riding in a covered carriage. The horse became frightened, and ran some distance before he could be controlled. In running, the horse came near collision with other teams, but no collision occurred, nor was the carriage upset or any one injured. However, immediately after the runaway, the insured became sick, and died in an hour after the accident. The question arose whether death was caused from bodily injuries through external, violent, and accidental means within the meaning of the policy, and the court held that it was. In the case cited the body of the deceased bore no marks of physical injury, nor did the body come in contact with any physical object during the time of the accident, but death no doubt resulted from physical strain and mental shock. In Insurance Co. v. Crandall, 120 U. S. 527, it was held that an insane man who takes his own life dies from an injury produced by external, accidental, and violent means. In the case of Trew v. Assurance Co., 5 Hurl. & N. 211, and on appeal 6 Hurl. & N. 839, 7 Jur. (N. S.) 878; Reynolds v. Insurance Co., 22 Law T. (N. S.) 820; and Winspear v. Insurance Co., 42 Law T. (N. S.) 900, 43 Law T. (N. S.) 459; affirmed 6 Q. B. Div. 42—it was held that death from drowning was caused by external and violent means within the meaning of an accident policy. In the Trew Case, which may be regarded as a leading one on the subject, it is argued: "Whereas, from the action of the water there is no external injury, death by the action of the water is not within the meaning of the policy." In reply to the argument the court said: "That argument, if carried to its extreme length, would apply to every case where death was immediate.

If a man fell from the top of a house, or overboard from a ship, and was killed, or if a man was suffocated by the smoke of a house on fire, such cases would be excluded from the policy, and the effect would be that policies of this kind in many cases where death resulted from accident would afford no protection whatever to the assured. We ought not to give those policies a construction which will defeat the protection of the assured in a large class of cases." 6 Hurl. & N. 844. In Paul v. Insurance Co., 112 N. Y. 472, 20 N. E. Rep. 347, the policy was substantially like the one in question here, indemnifying against injuries caused by external, violent, and accidental means. The insured died from inhaling illuminating gas. He was stopping at a hotel in New York city. He was found dead in his bed, the room being filled with gas. When found the deceased lay on his bed like a man asleep, without any external or visible signs of injury upon his body. An action on the policy was sustained, and in disposing of the question whether the injuries were caused by external and violent means the court said: "As to the point raised by the appellant that the death was not caused by external and violent means within the meaning of the policy, we think it a sufficient answer that the gas in the atmosphere, as an external cause, was a violent agency, in the sense that it worked upon the intestate so as to cause his death. That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause. The cases collated on the respondent's brief sufficiently establish that as a proposition. Trew v. Insurance Co., 7 Jur. (N. S.) 878; Reynolds v. Insurance Co., 22 Law T. (N. S.) 820; McGlinchey v. Casualty Co., 14 Atl. Rep. 13." If, as held in the case last cited, death from inhaling poisonous gas is to be regarded as caused by external and violent means, upon the same principle death resulting from the accidental taking of poison must be regarded as resulting from external and violent means. Again, where a person is drowned, having been suffocated by the action of the water in the lungs, if a death in such case is to be regarded as caused or produced by external and violent means as held in the cases heretofore cited, for the same reason a similar rule must be applied where death resulted as alleged in this case. Here the death arose from accidentally taking and drinking poison, and we are constrained to hold, when such is the case, the injury resulting in death may be regarded as received through violent means. If a person should receive a gunshot wound in the body resulting in death, it would be conceded that death ensued from violent and external means. For a like reason poison taken into the stomach producing death may also be treated as an external, violent means. Indeed we are inclined to concur with what was said by the court of appeals of New York in the case last cited, "that a death is the result of accident, or is unnatural, imports an external and violent agency as the cause." We have been cited to a few cases holding a different rule. Hill v. Insurance Co., 22 Hun, 187. This case was overruled by the later case of Paul v. Insurance Co., cited *supra*. Pollock v. Association, 102 Pa. St. 230, is a case sustaining the position of the defendant. But while we recognize the high ability of the court in which the case was decided we are not disposed to follow the rule there adopted. We think the rule established by the court of appeals of New York is better calculated to carry out the true intention of the parties where the contract of insurance was entered into, and one too more nearly in harmony with the current of authority bearing on the question. The judgment of the appellate and circuit courts will be reversed, and the cause remanded to the circuit court for further proceedings in conformity to this opinion.

NOTE.—The general rules for the construction of insurance policies stated and applied in the principal case are well supported by authority.[1] In case of accidental insurance it often becomes necessary to determine just what is meant by the term "accident" or "accidental means." Webster defines an accident as "an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected.[2] This definition has been approved in several cases,[3] and is probably as good as any that can be formulated in general terms. Other definitions are given in recent decisions, differing only in the phraseology. Thus, in one case it is said: "The definition of 'accident' generally assented to is an event happening without any human agency, or, if happening through human agency, an event which under the circumstances, is unusual and not expected to the person to whom it happens."[4] In another recent case it is said: "An accident is the happening of an event without the aid and design of the person, and which is unforseen."[5] Chief Justice Cockburn seems to have thought that an accident could not be produced by a known cause,[6] but if such be the true construction of his opinion in the case referred to he is not in accord with the authorities.

Accidents have been classified as follows: 1. Those that befall a person without human agency. 2. Those that are the result of human agency. The latter are divided as follows: 1. Those which happen to a per-

[1] May on Insurance, § 174, 175; Wood on Ins. (2d ed.) §§ 60, 62; Utter v. Travelers' Ins. Co., 65 Mich. 545; 8 Am. St. Rep. 913; Ins. Co. v. Scammon, 100 Ill. 644; Baley v. Ins. Co., 80 N. Y. 21; Allen v. St. Louis Ins. Co., 85 N. Y. 473; Paul v. Travelers' Ins. Co., 112 N. Y. 472; 8 Am. St. Rep. 758; McGlinchey v. Fidelity Co., 80 Me. 251; 6 Am. St. Rep. 190; N. W. Mut. Life Ins. Co. v. Hazelett, 105 Ind. 212.

[2] Webster's Dict. Tit. Accident. See also to same effect, 1 Abbott's Law Dict. 9, same title.

[3] North Am. L & A. Ins. Co. v. Burroughs, 69 Pa. St. 43; 8 Am. Rep. 212, 216; Schneider v. Provident L. Ins. Co., 24 Wis. 28, 30; Ripley v. Railway Ins. Co., 2 Bigelows L. & A. Ins. Rep. 738.

[4] McGlinchey v. Fidelity, etc. Co., 80 Me. 251; 6 Am. St. Rep. 190. See also Barry v. U. S. Mut. Accident Ass'n., 23 Fed. Rep. 712, 714.

[5] Paul v. Travelers' Ins. Co., 112 N. Y. 472; 8 Am. St. Rep. 758, 762. See also Supreme Council, etc. v. Garrigus, 104 Ind. 133.

[6] Sinclair v. Maritime Passengers' Assur. Co., 3 El. & E. 78; 30 L. J. Q. B. 77.

son by his own agency. 2. Those which befall a person by the agency of another person, without the concurrence of the latter's will. 3. Those which a person intentionally does, whereby another is unintentionally injured. 4. Those which a person intentionally does, whereby another is intentionally injured, but not in a rencounter or as the result of the injured persons' own misconduct and not forseen by the latter.[7] A policy of general insurance against injury by accident includes all accidents, no matter to which of the above classes they belong, unless the policy contains some limitation or exception.[8] But the exception or exclusion of liability for death or injury in certain specified ways does not enlarge or extend the scope of the general clause so as to make the company liable for death or injury caused by other than violent and accidental means.[9]

Insurance companies have been held liable upon accident policies in the following cases: Where the death of the insured was caused by drowning;[10] where he fell upon a railroad track in a fit and was run over by the cars,[11] where the insured in stepping from the train in which he was traveling fell through a hole in the floor of the bridge on which the train had stopped;[12] where, in alighting from a train, he slipped from the steps;[13] and where the insured while pitching hay, was injured by the handle of the pitchfork slipping and striking him on the bowels causing peritonitis from which death resulted.[14] It has also been held that one who was attacked and killed by highwaymen suffered death by accident within the meaning of an accident insurance policy,[15] and that one who was shot by a deputy sheriff, who did not know at whom he was shooting and did not intend to kill the assured, came to his death by "violent, external and accidental means."[16] It was also stated by the court in the same case that it could not be said as matter of law that the assured lost his life as the result of design either of himself or another within the meaning of a clause in the policy exonerating the company from liability in such case. But the Supreme Court of Kentucky recently held, in accordance with what seems to the writer to be the correct construction of the policy, that a condition in the policy, that "no claim shall be made * * * when the death may have been caused by intentional injuries inflicted by the insured or any other person," bars a recovery where the assured is waylaid and assassinated for the purpose of robbery.[17] Death caused from inhaling escaping gas while asleep is within the terms of a policy against death by "external, violent, and accidental means,"[18] even though the policy contains a clause that there shall be no liability for death caused by inhaling gas. "In expressing its intention not to be liable for death from 'inhaling gas,' the company can only be understood to mean a voluntary and intelligent act by the assured, and not an involuntary and unconscious act."[19] It has also been held that death caused by taking poison or an overdose of medicine comes within the terms of such a policy,[20] but other courts have held that the company is not liable in such a case, especially where the policy disclaims responsibility if the death "is caused by poison or is the result of design either on the part of the member or any other person."[21] An action can be maintained on an accident policy against death from external, accidental and violent means, notwithstanding a proviso that it shall not extend to death caused "wholly or in part by bodily infirmities or disease, or death caused by suicide," where the assured hangs himself while insane.[22] The presumption is against suicide, and where the assured is found dead under circumstances showing that his death was violent, in the absence of anything to show who caused it, there is no presumption of suicide, and it is for the jury to determine whether it was caused by murder, suicide or accident.[23] Indeed, it is nearly alway for the jury to determine, under proper instructions, whether the death or injury was the result of accident.[24] Death by sunstroke,[25] an epileptic fit,[26] or by rupture caused in jumping from a train, where nothing unforseen happened from the time the assured left the

[7] Hutchcraft's Ex'r v. Travelers' Ins. Co., 87 Ky. 300; 12 Am. St. Rep. 484. Grammatically, this classification is open to criticism, for it is difficult to see how one can "do" an accident; but it is so written in the reports, and the substance of the classification is not affected thereby.

[8] Prov. Life Ins. Co. v. Fennell, 49 Ill. 180; Prov. Life Ins. Co. v. Martin, 32 Md. 310; Hutchcraft's Ex'r v. Travelers' Ins. Co., 87 Ky. 300; 12 Am. St. Rep. 484.

[9] Southard v. Ins. Co., 34 Conn. 574.

[10] Trew v. R'y Passengers' Assur. Co., 6 Hurl & N. 839; 4 L. T. 833. Even where he fell into the water while in a fit. Winspear v. Accident Ins. Co., 6 L. R. (Q. B. Div.) 42; 43 L. T. 459; Reynolds v. Accidental Ins. Co., 22 L. T. (N. S.) 820; 18 Week. Rep. 1141. So where he fell into the water as the result of a wound. Mallory v. Travelers' Ins. Co., 47 N. Y. 52; 7 Am. Rep. 410.

[11] Lawrence v. Accident Co., L. R. 7 Q. B. Div. 216; 50 L. J. Q. B. 522. See also Schneider v. Travelers' Ins. Co., 58 Wis. 13; 46 Am. Rep. 618.

[12] Burkhard v. Travelers' Ins. Co., 102 Pa. St. 262; 48 Am. Rep. 205.

[13] Theobald v. Assurance Co., 10 Ex. 44. See further as to liability under policies against "railroad accidents" and accidents to travelers. Northrup v. Assurance Co., 43 N. Y. 516; 3 Am. Rep. 724; Tooley v. Pass. Assurance Co., 3 Biss. 399; Brown v. Rail. Pass. Assurance Co., 45 Mo. 221; Champlin v. Ins. Co., 6 Lans. 71. Compare Ripley v. Assurance Co., 1 Dill. 403; 16 Wall. 336.

[14] North Am. Ins. Co. v. Burroughs, 69 Pa. St. 43; 8 Am. Rep. 212. So, where the assured sprained the muscles of his back while lifting a heavy weight. Martin v. Travelers' Ins. Co., 1 Fost. & F. 505. So, where hernia resulted from an accidental fall, although the policy expressly excluded hernia. Filton v. Accidental Co., 17 Com. B. (N. S.) 122. See also Barry v. Accident Ass'n, 23 Fed. Rep. 712. But compare Bayliss v. Ins. Co., 6 Ins. L. J. 109.

[15] Ripley v. Ry. etc. Co., 2 Bigelow L. & Acc. Cas. 738; Hutchcrafts Ex'r v. Travelers' Ins. Co., 89 Ky. 300.

[16] Utter v. Travelers' Ins. Co., 65 Mich. 545; 8 Am. St. Rep. 913. Compare Shaffer v. Travelers' Ins. Co. (Ill.), 22 N. E. Rep. 589.

[17] Hutchcraft's Ex'r v. Travelers' Ins. Co., 87 Ky. 300; 12 Am. St. Rep. 484. See also De Graw v. Nat. Acc. Soc., 51 Hun, 142.

[18] Paul v. Travelers' Ins. Co., 112 N. Y. 472; 8 Am. St. Rep. 758; 20 N. E. Rep. 347; U. S. Mut Acc. Ass'n v. Newman, 84 Va. 52.

[19] Paul v. Travelers' Ins. Co., last note *supra*.

[20] Bacon v. U. S. Mut. Acc. Ass'n, 44 Hun, 599; Penfold v. Universal Life Co., 85 N. Y. 319; N. W. Mut. Life Ins. Co. v. Hazelett, 105 Ind. 212; 55 Am. Rep. 192.

[21] Bayliss v. Ins. Co., 6 Ins. L. J. 109; Pollock v. Ins. Co. 102 Pa. St. 230; 48 Am. Rep. 204.

[22] Crandal v. Accident Ins. Co., 120 U. S. 527; Compare Sheeter v. West Ins. Co., 65 Mich. 199; 8 Am. St. Rep. 882, and note.

[23] Travelers' Ins. Co. v. McConkey, 27 Cent. L. J. 158; 127 U. S. 661; Mallory v. Travelers' Ins. Co., 47 N. Y. 52.

[24] See U. S. Mut. Acc. v. Barry, 131 U. S. 100; Guldenkirch v. U. S. Mut. Acc. Ass'n, 5 N. Y. S. 428; Peck v. Equitable Ass'n, 52 Hun, 255; Trew v. Ry. Pass Assur. Co., 6 H. & N. 839.

[25] Sinclair v. Maritime Pass. Assur. Co., 3 El. & E. 478; 4 L. I. (N. S.) 15.

[26] Tennant v. Travelers' Ins. Co., 31 Fed. Rep. 322.

platform to the time he alighted on the ground[27] has been held not to be the result of accident.

Where the injury or death of the insured is the result of an accident, the fact that his carelessness or negligence may have contributed thereto is no defense, in the absence of any stipulation to that effect in the policy.[28] But insurance companies usually protect themselves from liability for the results of negligence and voluntary exposure to unnecessary danger on the part of the insured by provisions to that effect in their policies. The authorities cited in the note will show the proper construction and application of such provision as determined by the courts.[29]

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[27] Southard v. Ry. Pass. Assur. Co., 34 Conn. 574; U. S. Mut. Acc. Ass'n v. Barry, 131 U. S. 100.

[28] Providence L. Ins. Co. v. Martin, 32 Md. 310; Schneider v. Ins. Co., 24 Wis. 28; Champlin v. Travelers' Pass. Ins. Co., 6 Lans. 71.

[29] Holding that there could be no recovery under the particular circumstances are the following cases: Neil v. Ins. Co., 19 Cent. L. J. 157; Bon v. Ry. Pass. Assur. Co., 56 Ia. 664; 13 Cent. L. J. 390; Sawtelle v. Assur. Co., 15 Blatchf, 216; Tuttle v. Travelers' Ins. Co., 134 Mass. 175; 45 Am. Rep. 317; Travelers' Ins. Co. v. Jones, 80 Ga. 541; Hull v. Equitable Acc. Ass'n, 41 Minn. 231; Knapp v. Preferred Mut. Acc. Ass'n, 53 Hun, 84. Holding that the conditions in the policy did not prevent a recovery are the following: Stone v. U. S. Casualty Co., 34 N. J. L. 371; Burkhart v. Travelers' Ins. Co., 102 Pa. St. 262; Tucker v. Mut. Benefit Life Ins. Co., 50 Hun, 50; Schneider v. Prov. Ins. Co., 24 Wis. 28; 1 Am. Rep. 157; N. Am. Ins. Co. v. Burroughs, 69 Pa. St. 43; Marx v. Travelers' Ins. Co., 39 Fed. Rep. 321. As to conditions permitting recovery only in case of "total disability," see Rhodes v. Assur. Co., 5 Lans. 71; Lyon v. Ry. Pass. Assur. Co., 46 Ia. 631; Ford v. U. S. Mut. Acc. Co., 148 Mass. 153; Saveland v. Fidelity Co., 67 Wis. 174; Sawyer v. U. S. Casualty Co., 1 Big. L. & Acc. Cas. 289.

CORRESPONDENCE.

THE ULRICH CASE.

To the Editor of the Central Law Journal:

I infer from your notice of the Ulrich case (31 Cent. L. J. 343), decided by Judge Phillips in the United States District Court (not circuit court, as you say) for the Western District of Missouri, that you were not aware that Judge Phillips' decision was appealed from by the State to the United States Circuit Court, argued at the September Term, 1890, before Judge Caldwell, and the district court decision reversed by him. I understand that an appeal has been taken by Ulrich to the Supreme Court of the United States, where the questions will be authoritatively settled. In the meantime, the case presents the anomalous feature of two appeals pending at one and the same time, the other being to the State Supreme Court from the judgment of conviction in the Jackson county Criminal Court. Judge Caldwell holds that the State courts have plenary jurisdiction in the premises, and the prisoner must pursue his remedy there. I do not pretend to state all that was decided, however, not having seen the decision in full.

Respectfully, J. P. STROTHER,
Marshall, Mo., Nov. 1st, 1890.

HUMORS OF THE LAW.

Mother—Well, did you get that situation as an office boy? Little son—Nope. Mother—What was the matter? Little son—Don't know. The gent is a lawyer, and he asked me if I was a good whistler, and I told him I was the best whistler on our street, and he said I wouldn't do. Guess he wants a reg'lar professional.

From a recent decision in the House of Lords: "Lord Macnaghten—My Lords: I entirely agree, and I do not desire to add anything. Lord Morris—My Lords: I also concur. Lord Field—My Lords: I concur. I have nothing whatever to add to the observations made by my noble and learned friends." Blessings on those lords.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMIRALTY—Damages — Malicious Prosecution.—One who libels a ship in good faith and without malice, and fails in the suit is not liable therefor in an action *ex delicto*.—*Kemp v. Brown*, U. S. D. C. (La.), 43 Fed. Rep. 391.

2. AGISTMENT—Negligence.—Where there is no express contract as to the kind of feed and degree of care to be given by one who takes cattle to keep through the winter, he is bound to provide reasonable and ordinary feed for such stock, and to use reasonable and ordinary care to protect them from injury; but where a number of such cattle die while in charge of the bailee, and the bailee states that fact to the owner—in other words, accounts for the cattle—the burden of proof of negligence is upon the owner.—*Calland v. Nichols*, Neb., 46 N. W. Rep. 631.

3. ANIMALS—Injuries.—In an action for personal injury, caused by defendant's cow, it is not necessary to allege *scienter* where it is alleged that the injury was committed while the cow was negligently permitted, by defendant to trespass on plaintiff's premises.—*Mosier v. Beale*, U. S. C. C. (Cal.), 43 Fed. Rep. 358.

4. APPEAL—Writ of Error.—When on writ of error the record discloses only a complaint, demurred to the same, and an answer, but there is no record of any proceedings, had upon the demurrer, an assignment of error, based on its being overruled, cannot be considered, as the answer must in such case be treated as

a waiver of the demurrer.—*Dingle v. Swain*, Colo., 24 Pac. Rep. 876.

5. APPEAL-BOND—Liability of Sureties.—Sureties in an appeal-bond are not chargeable for any costs adjudged on questions outside of the stipulations of the bond.—*Jones v. Woodstock Iron Co.*, Ala., 8 South. Rep. 132.

6. APPEAL-BOND—Penalty.—Where a party appeals from a personal judgment or decree against him for a sum of money for which there is no other security than the judgment or decree, he will be required to give an appeal-bond sufficient to secure the satisfaction of the judgment or decree.—*Richardson v. Richardson*, Mich., 46 N. W. Rep. 670.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS—Lease.—Where the general assignee of a lessee, after being informed of the existence of a lease of the store, continues to occupy the demised premises, and pays rent for two months, the presumption is that he accepted the interest of his assignor, and such presumption is not rebutted by the assignee's testimony that he kept the store in order to get a settlement, there being nothing to show the nature of the settlement, or what was done with the store thereafter.—*Smith v. Ingram*, Ala., 8 South. Rep. 144.

8. ATTACHMENT—Claims not Due.—Under Gen. St. Colo. § 2003, providing for attachment in certain cases upon debts not at the time due, defendant in attachment on notes not due is not entitled to judgment on the merits, on the ground that the notes were not due when the suit was instituted, when plaintiff brings himself within the provisions of the statute by his affidavit and sustains the grounds of attachment by his evidence.—*Hurtgen v. Kantrowitz*, Colo., 24 Pac. Rep. 872.

9. BASTARDY—Evidence.—A verdict against the putative father of a bastard founded on the testimony of the prosecutrix, which was contradicted by defendant, will not be disturbed even though the child was born before the usual period of gestation, when there is evidence in the case showing that the exact time of gestation is not a controlling circumstance.—*State v. Ginger*, Iowa, 46 N. W. Rep. 657.

10. CARRIERS — Live-stock Shipments.—Where one ships a horse as an ordinary horse, understanding that the railroad has a regulation limiting its liability, in case of injury, to $200 for an ordinary horse, and that if a higher valuation is given a higher rate of transportation will be charged, the shipper cannot recover a greater amount in case of loss.—*Duntley v. Boston M. R. R.*, N. H., 20 Atl. Rep. 327.

11. CARRIERS OF GOODS—Special Contract.—Where a freighter acting as a common carrier, contracts in writing to transport perishable goods across the country, and there is a stipulation in the contract that he shall receive a sum in addition to the regular freight if the goods are delivered by a certain date, it is error in an action by the shipper for damages to the goods to submit to the jury the question whether he contracted to positively deliver the goods by that date. *Carr v. Schafer*, Colo., 24 Pac. Rep. 873.

12. CHATTEL MORTGAGES—Property Brought into State.—Under Code Ala. § 1814, a mortgage to which personal property is subject at the time of its removal into Alabama, and which has been recorded in the proper county in that State within four months after the arrival of such property, is superior to the lien of an attachment levied before the mortgage is recorded. —*Johnson v. Hughes*, Ala., 8 South. Rep. 147.

13. CONSTITUTIONAL LAW—Special Laws.—Const. Cal. art. 4, § 25, subd. 28, provides that the legislature shall not pass local or special laws, "creating offices, or prescribing the powers of officers, in counties, cities," etc. St. 1871-72, §§ 1, 6, pp. 243, 244, provides for a board of police commissioners of the city of Sacramento, and the appointment of not over 15 policemen. St. 1889, p. 148, amends the act of 1871-72 by authorizing the police commissioners to appoint any number of police not exceeding 30: *Held*, upon *mandamus* to compel the levy of a tax to raise a sum of money to pay the salaries of the extra policemen appointed under the act of 1889, that said act was a special act, and therefore unconstitutional.—*Farrell v. Board of Trustees*, Cal., 24 Pac. Rep. 868.

14. CONTEMPT—What Constitutes.—A petition for a change of venue on account of the prejudice of the judge alleged that the wife of the judge, at the time of the trial of another suit in which plaintiff in the present case was interested, had stated in the presence of petitioner "that she must go and see the judge, and arrange with him to have Mrs. Davis (meaning the plaintiff herein) to win her case:" *Held*, that petitioner was not liable for contempt for alleging such statement in his petition.—*Mullin v. People*, Colo., 24 Pac. Rep. 880.

15. CONTRACT—Conditions.—The defendant gave the plaintiff a written proposition to sell certain real estate in the city of Omaha, for a specified price, conditioned that the plaintiff should pay his note given to the defendant for merchandise within six months, and pay the one-half of the price named during 1873, and the balance in 1874: *Held*, that the payment of the note within the time limited was a condition precedent to the plaintiff's right to accept the offer.—*Schields v. Horbach*, Neb., 46 N. W. Rep. 629.

16. CONTRACT—Performance.—Where there is a written contract by which one of the parties agrees to construct a building for a certain time, a waiver or abandonment of the provision as to the time for its completion is not a waiver or an abandonment of other features of the contract.—*Jacksonville & A. R. Co. v. Woodworth*, Fla., 8 South. Rep. 177.

17. CONTRACTS FOR WORK AND LABOR.—In an action on a contract which stipulates that plaintiff shall labor faithfully for defendant's interest, evidence that he told others of defendant's employees that they would not get their pay, and that he did not expect to get his, is inadmissible, in the absence of any showing that the men quit, or that defendant was injured by these declarations.—*Eckelund v. Talbot*, Iowa, 46 N. W. Rep. 661.

18. CORPORATIONS—Stockholders.—Where one corporation acquires a majority of the stock of a rival corporation, and a bill by a stockholder of the latter company to enjoin the other company from voting such stock in an election of directors fails to allege a demand and refusal upon the part of the directors of complainant's company to bring the suit in the corporate name, such failure is excused where the directors of defendant company had constituted a majority of the governing board of complainant company.—*Mack v. De Bardelaben C. & I. Co.*, Ala., 8 South. Rep. 150.

19. COUNTIES—Constitutional Law—Funding Acts.—Const. Colo. art. 11, § 6, as amended November 6, 1888, provides that any county may contract a debt by loan by the issuance of bonds for the purpose of liquidating indebtedness incurred prior to December 31, 1886: *Held*, that the funding act (Sess. Laws 1885, p. 232), providing for the funding of valid county debts, was not repealed by implication, and that under that act the counties could fund their valid obligations incurred since December 31, 1886.—*In re Funding of County Indebtedness*, Colo., 24 Pac. Rep. 877.

20. CRIMINAL EVIDENCE—Murder.—On trial for murder it appeared that deceased and another were sitting together in front of a drug-store when the wife of defendant passed them, and made some remark which caused deceased to follow her. While walking with her defendant approached and, in the affray that ensued, killed deceased with a pocket knife: *Held*, that the companion of deceased might testify that deceased told him, as he left to follow the woman, that he was going to "see what she wanted," this expression being a part of the *res gestæ*.—*State v. Peffers*, Iowa, 46 N. W. Rep. 662.

21. CRIMINAL LAW—Arson.—Under Code Ala. 1886, § 3780, when an inhabited dwelling-house is burned, the character of the structure constitutes arson in the first

degree, without regard to the presence of a human being therein at the time, and that the words, "in which there was at the time no human being," in an indictment charging the burning of an inhabited dwelling-house, were mere surplusage, and might be disregarded.—*Paine v. State*, Ala., 8 South. Rep. 133.

22. CRIMINAL LAW—Carrying Weapons.—Code Ala. 1886 § 3775, recognizing the right of a citizen to carry concealed a knife, pistol, or other weapon of the several kinds therein described, for purposes of self-defense, does not embrace brass knuckles, slung shots, or weapons of like kind, described in section 3776 of said Code.—*Bell v. State*, Ala., 8 South. Rep. 133.

23. CRIMINAL LAW—Larceny.—A charge that "unless the prosecution has proved beyond a reasonable doubt that the defendant feloniously stole the money of the complaining witness it is your duty to acquit the defendant," is not erroneous, as being an insufficient definition of larceny, when no further instruction was asked.—*People v. Christensen*, Cal., 24 Pac. Rep. 888.

24. CRIMINAL LAW—Murder—Intent.—Under Pen. Code Cal. § 1105, providing that after the commission of the criminal act is shown by the prosecution, the burden of proof then rests on defendant to show the absence of criminal intent, it is only necessary for defendant to introduce such evidence as will create a reasonable doubt of his guilt. He need not prove the circumstances of mitigation by a preponderance of evidence.—*People v. Ah Gee Yung*, Cal., 24 Pac. Rep. 860.

25. CRIMINAL LAW—Venue.—Crim. Code Ky. § 24, provides: "If the jurisdiction of an offense be in two or more counties, the defendant shall be tried in the county in which he is first arrested:" *Held*, that, where defendant stole a horse in the county of M, and sold it in the county of B, where he was arrested at the instance of the authorities in M, the latter county thereby obtained jurisdiction.—*Massie v. Commonwealth*, Ky., 14 S. W. Rep. 419.

26. CRIMINAL PRACTICE—Assault with Intent to Kill.—Under Rev. St. Ind. 1881, § 1910, an information which charges that defendant "did unlawfully and feloniously attempt to commit a violent injury upon the person of * * *, then and there having the present ability to commit such injury, by then and there, feloniously, purposely, and with premeditated malice, holding in his two hands two large stones, with intent then and thereby him, the said * * *, feloniously, purposely, and with premeditated malice, to kill and murder," is sufficient to sustain a conviction for assault with intent to kill.—*Freel v. State*, Ind., 25 N. E. Rep. 178.

27. CRIMINAL PRACTICE—Information.—An information for murder signed and presented by a *de facto* assistant district attorney appointed by the board of supervisors without authority, but recognized as such by the district attorney, and acting under his directions, is good, as being the act of the proper officer.—*People v. Turner*, Cal., 24 Pac. Rep. 857.

28. CRIMINAL PRACTICE—Intoxicating Liquors.—In case of misdemeanor several distinct offenses of the same kind may be joined in the same indictment.—*Martin v. State*, Neb., 46 N. W. Rep. 621.

29. CRIMINAL PRACTICE—Speedy Trial.—Under Const. Cal. art. 1, § 13, and Pen. Code Cal. § 1382, a prisoner against whom an information was filed on August 7th, and who was arraigned, and pleaded not guilty five days later, was entitled to a dismissal of the case for want of prosecution, on motion made in the following March, when it appeared that he had made no application for a continuance, and no cause for the delay was shown by the prosecution.—*People v. Morino*, Cal., 24 Pac. Rep. 892.

30. DAMAGES FOR INJURIES TO WIFE.—In an action against a borough by a husband for damages for an injury sustained by his wife from a fall on the sidewalk, the plaintiff can recover, not only for temporary, but for permanent, loss of earning power.—*Readdy v. Borough of Shamokin*, Pa., 20 Atl. Rep. 896.

31. DEATH BY WRONGFUL ACT.—Under Code Civil Proc. Cal. § 377, permitting either the heirs or personal representative of a decedent to bring an action for his wrongful death, only one action for such cause can be brought, and a recovery by the executor is a bar to an action by the heirs.—*Hartigan v. Southern Pac. R. Co.*, Cal., 24 Pac. Rep. 857.

32. DEATH BY WRONGFUL ACT—Survival.—Under Rev. St. Ind. 1881, § 284, which provides that, "where the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action against the latter," such action cannot be maintained against the personal representatives of the wrong-doer after his death.—*Hamilton v. Jones*, Ind., 25 N. E. Rep. 192.

33. DEDICATION—Plat.—The written explanation accompanying a plat stated that it was a plat of certain land "in blocks or squares by the drawing of lines across said ground where the center line of the street will come when the same is platted to correspond with the C plat and the streets in this plat; it being the intention to plat said grounds, or in the event of their being sold to provide for their being platted, to correspond with the contiguous ground already platted: *Held*, that this did not constitute a dedication of land for streets between the blocks.—*City of New Albany v. Williams*, Ind., 25 N. E. Rep. 187.

34. DEED.—The paper writing, purporting to be an article of agreement, set out in the opinion, *held*, not to convey title to the land described.—*Norman v. White*, Neb., 46 N. W. Rep. 639.

35. DEED—Boundaries.—A deed of lots according to a plat on which the lots are bounded on one side by an alley passes title to the center of the alley, where the grantor's title extends thereto.—*Jacob v. Woolfolk*, Ky., 14 S. W. Rep. 415.

36. DEED—Mistake—Reformation.—Where it clearly appears that a deed, drawn professedly to carry out the agreement of the parties previously entered into, is executed under the misapprehension that it really embodies the agreement, whereas, by mistake of the draughtsman, either as to fact or law, it fails to fulfill that purpose, equity will correct the mistake by reforming the instrument in accordance with the contract.—*Truesdell v. Lehman*, N. J., 20 Atl. Rep. 391.

37. DEED BY HEIR.—A deed without warranty of the grantor's expectant interest in the estate of his ancestor who is still alive and in possession, does not pass the grantor's after-acquired estate of inheritance, though the deed was made in good faith in consideration of the full value of the expectant estate, where it does not appear that such purchase price was the full value of the property conveyed, nor that the ancestor knew of the sale, and acquiesced in it.—*McClure v. Raben*, Ind., 25 N. E. Rep. 179.

38. DISCOVERY—Bill by Creditors.—A bill for discovery filed under Code Ala. 1886, § 3545, which provides that a creditor who has no lien or judgment may file a bill in chancery for the discovery of assets of the debtor, liable to the payment of his debts, is fatally defective where it fails to show that defendant is without visible means, subject to legal process, of value sufficient to pay the debt, and that he has means or assets, not accessible under legal process, liable to the satisfaction of the debt.—*Lawson v. Warren*, Ala., 8 South. Rep. 141.

39. DIVORCE—Alimony.—An estate in remainder in real and personal property, which remainder is vested as to interest, though contingent as to amount, is real and personal property, within the meaning of section 5699, Rev. St.; and where, in a proceeding by a wife against her husband, a decree of divorce is granted, and a case is made warranting the allowance of alimony, it is not error for the court to allow to the plaintiff alimony, and adjudge that the same be made a lien upon such remainder held by the husband in such real estate.—*Min Young v. Min Young*, Ohio, 25 N. E. Rep. 168.

40. DIVORCE—Evidence.—Under the statutory requirement that the residence of plaintiff in a suit for divorce

shall be proved by at least two witnesses who are resident freeholders and householders of the State, an admission by the defendant's counsel at the trial as to plaintiff's residence is not sufficient to excuse the absence of such proof.—*Prettyman v. Prettyman*, Ind., 25 N. E. Rep. 179.

41. DIVORCE—Residence.—A divorce granted by the court of a State in which neither party resides is void.—*Watkins v. Watkins*, Ind., 25 N. E. Rep. 175.

42. EJECTMENT—Finding.—While the *gravamen* in an action of ejectment is the wrongful withholding, it is not necessary that the words "wrongful" or "wrongfully" should be used in a finding that defendant ousted plaintiff.—*Johnson v. Vance*, Cal., 24 Pac. Rep. 263.

43. EVIDENCE—Notice to Produce Books.—The legal consequence of a failure or refusal to produce writings or books upon notice is to entitle the other party to give secondary evidence of their contents, and not that the court should order their production to be used as evidence against the party having possession and to whom they belong.—*Golden v. Conner*, Ala., 8 South. Rep. 148.

44. EVIDENCE—Parol.—As a general rule, the consideration recited in an instrument under seal, as well as in a simple receipt, is *prima facie* evidence only, and may be controlled or rebutted by parol proof.—*Fechheimer v. Trounstine*, Colo., 24 Pac. Rep. 882.

45. EVIDENCE—Parol.—The writing, "The undersigned agrees to accept Case engine, and keep the same 30 days, and pay $3.50 per day," etc., signed only by lessee of the engine, is not a contract on the part of the owners, and in an action for the rent thereof, parol evidence is admissible to show that the owners warranted the engine to do the work for which it was leased.—*Smith v. Coleman*, Wis., 46 N. W. Rep. 664.

46. EVIDENCE—Preponderance.—The preponderance of evidence is not determined alone by the number of witnesses testifying to a particular fact. In determining upon which side the evidence preponderates, the credibility of the witnesses, their situation, interest, means of knowledge, and manner of testifying, should be considered.—*Fitzgerald v. Richardson*, Neb., 46 N. W. Rep. 615.

47. EXECUTORS—Liability as Trustees.—An executor who takes possession of assets belonging to the estate, and gives to his co-executors a note secured by mortgage for the amount, is a trustee of the fund, and the statute of limitations will not run to his favor until there is an express repudiation by him of the trust.—*Fox v. Tay*, Cal., 24 Pac. Rep. 855.

48. EXECUTORS AND ADMINISTRATORS—Final Settlement.—Under Acts Ind. 1883, p. 160, § 23, which provides that when an administrator files his final settlement the clerk shall fix a day for hearing it, the final order rendered at such hearing is not invalidated by the fact that the time for the hearing was fixed by the court and not by the clerk. In the absence of any showing that no administration has been had on the estate of a decedent, and that his estate owes no debts, his heir has no right to the personal property of such estate.—*Williams v. Williams*, Ind., 25 N. E. Rep. 176.

49. FRAUDS, STATUTE OF—Specific Performance.—A verbal agreement to share the profits arising from the purchase and sale of real estate may be made independent of any contract for an interest in the land itself. When so made, the agreement is not within the statute of frauds, and may become the foundation of an action for a money judgment, but not for a decree of specific performance affecting the title to the real estate.—*Von Trotha v. Bamberger*, Colo., 24 Pac. Rep. 883.

50. FRAUDULENT CONVEYANCES.—Where plaintiff in ejectment, claiming under a sheriff's deed, shows that his debt existed prior to the execution of the deed under which the defendant claims, and that the execution debtor was in possession of the land at the time of the execution sale, which took place after the making of the deed to defendant, the burden is on defendant to show that the conveyance under which he claims was supported by both valuable and an adequate consideration.—*Mobile Sav. Bank v. McDonnell*, Ala., 8 South. Rep. 137.

51. FRAUDULENT CONVEYANCES—Husband and Wife.—Where a debtor buys land which he causes to be conveyed to his wife in alleged satisfaction of a debt due from him to her, but with the intention of putting his property beyond reach of his creditors, and she agrees at the time to mortgage the land for his benefit, the transaction is fraudulent as to his creditors.—*Marshall v. Whitney*, U. S. C. C. (Ind.), 43 Fed. Rep. 343.

52. HIGHWAYS—Establishment.—Under Rev. St. Ind. 1881, § 5772, a person who is named in a petition for opening a highway as one whose land is to be taken therefor need not file such an affidavit in order to appeal from an order establishing such highway, since he is a party to the proceeding.—*Wilson v. Wheeler*, Ind., 25 N. E. Rep. 190.

53. HOMESTEAD—Decedent's Estate.—The homestead of a husband and wife was their community property. After the husband's death a judgment was rendered against the widow, and execution levied on the property. After the widow's death the judgment creditor instituted proceedings under Civil Code Cal. § 1245, to have the property appraised, and the excess over $5,000, if any, applied on his judgment: *Held* that, under Code Civil Proc. § 1505, as the levy on the homestead created no lien, the proceeding under section 1245 could not be maintained, but the judgment should be presented to the administrator.—*Sanders v. Russell*, Cal., 24 Pac. Rep. 852.

54. HOMESTEAD—Injunction.—Under Civil Code Cal. § 1265, providing for the disposition of a homestead after the death of the person whose property has been selected as a homestead, and also that in no case shall it be liable for the debts of the owner "except as provided in this title," a homestead set apart under section 1261 Subd. 3, by a son with whom his mother resides, cannot be subjected to his debts after her death.—*Roth v. Insley*, Cal., 24 Pac. Rep. 853.

55. HOMESTEAD — Wife's Separate Estate.—Where testatrix dies leaving no other property than the premises which she and her husband had occupied as a homestead, although, by her will, she distributes her entire estate in the form of money bequests, and authorizes her executor to sell the whole property, the interest of the legatees is subject to the right of the husband to a homestead for a limited period, and to the authority and duty of the court to set it apart, given by Code Civil Proc. Cal. §§ 1465, 1468.—*In re Lahiff's Estate*, Cal., 24 Pac. Rep. 850.

56. HUSBAND AND WIFE—Deed.—In a contest between a wife and a creditor of her husband over property transferred to her by him after the debt is contracted, she must establish that she is a *bona fide* purchaser by a preponderance of the evidence.—*Stevens v. Carson*, Neb., 46 N. W. Rep. 655.

57. INJUNCTION—Personal Contract.—As a general rule equity has no jurisdiction to prevent by injunction the violation of a merely personal contract unless such contract be of that class or character capable of being enforced by specific performance.—*Shepherd v. Groff*, W. Va., 11 S. E. Rep. 997.

58. INSURANCE—Conditions of Policy.—A provision in a policy making it void if the property be sold or transferred, or any change take place in the title, is violated by a written contract of sale passing the equitable title and the beneficial interest.—*Cottingham v. Fireman's Fund Ins. Co.*, Ky., 14 S. W. Rep. 417.

59. INSURANCE—Warranties.—The husband who occupies with his wife and family her homestead has an insurable interest in the house.—*Reynolds v. Iowa & N. Ins. Co.*, Iowa, 46 N. W. Rep. 659.

60. INSURANCE COMPANIES—Process.—Elliott, Supp. Ind. § 998, which provides that no foreign insurance company shall do business in Indiana until it has filed, with the auditor of State, its consent that process against it may be served upon any one of its authorized

agents in the State, and, in the absence of such agent, upon the auditor of State, excepts foreign insurance companies from the provisions of Rev. St. Ind, 1881, §§ 316, 3022, 3023, regulating the service of process on foreign corporations in general.—*Rehm v. German Ins. & Sav. Inst.*, Ind., 25 N. E. Rep. 173.

61. INTOXICATING LIQUORS—Illegal Sale.—In a prosecution for selling spirituous liquors without a license, a defense that defendant, a butcher, sold some beef to the complaining witness, and gave him the whiskey without consideration, is not sustained where the evidence shows that the witness applied to buy whiskey and not beef, and that the latter article was not worth the money paid, and was not delivered until several days later.—*Marcus v. State*, Ala., 8 South. Rep. 155.

62. INTOXICATING LIQUORS—Illegal Sale.—Whether the sale of "bitters," consisting of 20 per cent. alcohol, and the remaining 80 per cent. water, herbs, barks, roots, etc., is a violation of a prohibitory liquor law, depends upon the question whether in such article the distinctive character and effect of intoxicating liquor are present, so that it may be used as an intoxicating beverage, notwithstanding the other ingredients. If it cannot be so used, if the other ingredients are medicinal, and the alcohol is a necessary preservative or vehicle for them, the sale is lawful.—*Carl v. State*, Ala., 8 South. Rep. 156.

63. INTOXICATING LIQUORS—Information.—In an information for the sale of intoxicating liquors, the names of the persons to whom liquors were sold, if known, should be alleged, or the fact of their being unknown be averred in excuse.—*Martin v. State*, Neb., 46 N. W. Rep. 618.

64. INTOXICATING LIQUORS—Original Package.—Where bottles of whiskey, each sealed up in a paper wrapper and closely packed together in uncovered wooden boxes furnished by an express company, and marked, "To be returned," are shipped from one State to another, the boxes, and not the bottles, constitute the "original packages" within the meaning of decisions of the supreme court upon the interstate commerce provision of the national constitution.—*In re Harmon*, U. S. C. C. (Miss.), 43 Fed. Rep. 372.

65. JUDICIAL SALE—Trust.—Where a person buys property belonging to an estate, at a sale ordered by court, under an agreement that the administratrix shall have it on repaying such amount, such sale is void, but there is no resulting trust in favor of the heirs.—*Corbet v. Daly*, Mich., 46 N. W. Rep. 671.

66. JUDGMENT—Compromise—Attorney's Fee.—Upon the compromise of a justice's judgment, the debtor agreed to pay the fee of plaintiff's attorney, without any amount being mentioned. *Held*, that he was bound to pay the fee agreed upon between plaintiff and his attorney, whatever the amount might be.—*Thompson v. McMillan*, Tenn., 14 S. W. Rep. 439.

67. JUDGMENT—Evidence.—Where a transcript of a judgment of a court of another State is properly certified in accoradance with the requirements of the act of congress, and is authenticated in due form, it is entitled to equal faith and credit with a domestic judgment; and it must be presumed that the court legally possessed jurisdiction over tee subject matter upon which it professed to adjudicate, until the contrary is shown.—*Bogan v. Hamilton*, Ala., 8 South. Rep. 186.

68. JUDGMENT—Satisfaction.—Where property is levied on and sold by direction of the execution creditor, who purchases it for the amount of his judgment, with notice that it does not belong to the execution debtor, such purchase is a satisfaction of the judgment, though the debtor had no title or interest whatever in the property.—*Thomas v. Glazener*, Ala., 8 South. Rep. 153.

69. LIBEL.—A newspaper publication charging that a breach of promise suit was about to be brought against plaintiff is libelous *per se*, as its tendency is to disgrace plaintiff, and to bring him into contempt and ridicule.—*Morey v. Morning Journal Ass'n*, N. Y., 25 N. E. Rep. 161.

70. LIENS—Agricultural Laborers.—The words "any contract" as used in Code Ala. § 3078, declaring that agricultural laborers shall have a lien upon the crops grown during the current year for labor and services rendered in the cultivation of such crops under "any contracts" for such labor and services, include an implied as well as an express contract.—*Wilson v. Taylor*, Ala., 8 South. Rep. 149.

71. LIMITATION OF ACTIONS.—The statute of limitations begins to run against a suit to quiet title from the time the defendant takes possession of the land.—*Moore v. Miller*, U. S. C. C. (Cal.), 43 Fed. Rep. 347.

72. LIMITATION OF ACTIONS—Mandamus.—A proceeding by *mandamus* not being otherwise provided for in the statute of limitations *held* to fall under section 16 of the Code of Civil Procedure, and is barred at the end of four years.—*State v. School-Dist. No. 9*, Neb., 46 N. W. Rep. 613.

73. MALICIOUS MISCHIEF — Complaint.—A criminal complaint for wantonly killing a cow is not defective for employing the present tense in describing the killing.—*Walker v. State*, Ala., 8 South. Rep. 144.

74. MARITIME LIENS — Material-Men.—The lien of a material-man does not attach to a wrecking outfit leased by the owner of a tug, not as a part of its general equipment, but for a special purpose, although a part of such outfit is attached to the hull and deck by timbers and bolts, and libelants supposed it belonged to the tug, and had never heard that a third person claimed an interest in it.—*The Mildred*, U. S. C. C. (Mich.), 43 Fed. Rep. 393.

75. MARRIED WOMEN—Separate Estate.— Where real estate is conveyed directly to a married woman by a vendor, the deed showing on its face that the consideration for said real estate is to be paid by said vendee in deferred payments, said vendee executing her notes to the vendor for said deferred payments, the first of which payments appears to have been made by said vendee out of the proceeds of ice gathered and put up on said land by the husband of vendee, acting as her agent, neither said ice, nor a horse nor other property purchased with the proceeds of said ice, should be held liable to be levied upon and sold as the property of said husband for his debts.—*Robinson v. Neill*, W. Va., 11 S. E. Rep. 999.

76. MASTER AND SERVANT—Contributory Negligence.—Where a brakeman, in violation of the rules of the company, undertakes to make a coupling to a moving train, and is injured, he cannot recover for the injury, and it is immaterial that he was ordered to make the coupling by the engineer of the train.—*East Tennessee, V. & G. Ry. Co. v. Smith*, Tenn., 14 S. W. Rep. 427.

77. MECHANIC'S LIEN — Orders.— Where contractors give orders to material-men on the owners to pay certain amounts on the completion of the buildings, notice of this will not make the owners liable to such material-men for payments thereafter made to the contractors, such payments being due at the time when made, and there being others to be made according to the contract on the completion of the building.—*Wakeman v. Noble*, N. J., 20 Atl. Rep. 388.

78. MORTGAGE—Foreclosure.—A bill in equity to redeem and enjoin sale of land under mortgage alleged that, after tender of the full amount due under the mortgage had been twice made, defendant commenced foreclosure proceedings, and that, after answers had been filed, he dismissed the bill without prejudice, and advertised the land for sale under the power of sale in the mortgage, his purpose being to coerce the payment of another claim not connected with the mortgage: *Held*, that these allegations, not having been met by answer, justified the retention of the injunction.—*McCalley v. Otey*, Ala., 8 South. Rep. 110.

79. MORTGAGE—Foreclosure.—Where part of a tract of land burdened with a vendor's lien is mortgaged to secure a contingent liability, the mortgagee cannot in a suit to foreclose the lien, have the value of the mortgaged portion ascertained by the decree, so that it shall be decreed to pay only its proportion of the lien, when, at the time of the decree, the mortgagor's

liability has not become liquidated and absolute.—*Gridley v. Brooks-Waterfield Co.*, Ky., 14 S. W. Rep. 407.

80. MORTGAGE—Merger.—A merger takes place when a greater estate and a less meet in one and the same person, in one and the same right, without any intermediate estate, the lesser estate being thereby merged in the greater; but merger is not a necessary result of the union of the two estates in the same person. The intention and interest of the party who unites the two estates in himself will determine whether or not a merger takes place.—*Jackson v. Relf*, Fla., 8 South. Rep. 184.

81. MORTGAGE—Sale under Power.—Where a mortgagee takes possession of the mortgaged property on the law-day of the mortgage, sells the same under the power of sale in the mortgage, and becomes the purchaser, and thereafter continues in possession of the property claiming it as his own, an action for use and occupation cannot be maintained against him by the mortgagor, under Code Ala. § 2715.—*Powell v. New England Mortg. Security Co.*, Ala.. 8 South. Rep. 136.

82. MORTGAGE—Trust-Deed.—A paper made for a deed of trust conveying land to secure a debt signed by the grantor, but without a seal, though not effectual as a deed of trust at law, is an equitable mortgage, enforceable in equity, and may be recorded under section 4, ch. 74, Code 1868, and when recorded is a lien valid against subsequent purchasers and creditors.—*Atkinson v. Miller*, W. Va., 11 S. E. Rep. 1007.

83. MUNICIPAL CORPORATIONS—Claims against City.—The allowance of a claim by the city council with the condition annexed to it, "to be paid when there is money in the treasury to pay with," is binding on the city, and the condition will not defeat an action to recover a judgment thereon.—*National Lumber Co. v. City of Wymore*, Neb., 46 N. W. Rep. 622.

84. MUNICIPAL CORPORATIONS—Defective Streets.—The defendant deposited snow and other refuse material on the bank of the Mississippi river, at the foot of one of the streets in the city, the practical effect of which was to extend the street over the bank so as to be unsafe for persons approaching the river over the street, and the plaintiff, being unaware of the danger, passed over upon an embankment caused by the accumulation of such material, and was injured: *Held*, that the provision of the city charter, requiring notice to be given within thirty days of an injury caused by the defective condition of a street, is applicable to such a case, unless it is made to appear that the party injured is "bereft of reason" in consequence of the injury, within the meaning of the statute excusing notice in such cases.—*Ray v. City of St. Paul*, Minn., 46 N. W. Rep. 675.

85. MUNICIPAL CORPORATIONS—Public Improvements.—The provision contained in section 2327 of the Revised Statutes, that the proceedings with respect to public improvements by municipal corporations "shall be strictly construed in favor of the owner of property assessed or injured, as to the limitations on the assessment of private property, and compensation for damages sustained," requires that a strict construction be placed upon those proceedings by which it is sought to deprive the owner of his right to damages for property taken for, or injured by, the improvement; and, in order to create a forfeiture or bar of his claim, it must appear that the conditions upon which such forfeiture or bar depends have been strictly performed.—*City of Cincinnati v. Sherike*, Ohio, 25 N. E. Rep. 169.

86. MUTUAL BENEFIT INSURANCE—By-Laws.—A by-law of such a society which provides that a member claiming benefits must make proof of loss before certain subordinate officers, and, if their decision is against him, appeal to higher officers, whose decision shall be final, is valid in so far as it requires such an appeal to be taken before suit may be brought on the membership certificate, and void in so far as it declares the decision of the appellate tribunal final so as to bar a resort to the courts.—*Supreme Council of Order of Chosen Friends v. Forsinger*, Ind., 25 N. E. Rep. 129.

87. NEGLIGENCE — Damages.—Testimony that, while plaintiff was in the act of alighting from defendant's street-car, the driver suddenly started the car with a jerk, which caused her to fall, whereby she was injured, established a *prima facie* case of negligence in the management of the car, and throws the burden of disproof on the defendant.—*Birmingham Union Ry. Co. v. Hale*, Ala., 8 South. Rep. 142.

88. NEGOTIABLE INSTRUMENT—Indorsement.—Mere indorsement of name of payee on promissory note is ineffectual to pass the title thereto without delivery.—*Spencer v. Carstarphen*, Colo., 24 Pac. Rep. 882.

89. NEW TRIAL—Incompetency of Attorney.—The action of the trial court in refusing to grant a motion for a new trial will not be interfered with on appeal where plaintiff's affidavit in support of the motion states that, "when he came into the court-room to attend to his said cause" he was surprised to find after the trial of his cause had commenced that his attorney was in a state of intoxication, and was wholly unable to attend to the case, and that plaintiff did not know of the condition of his attorney "until after the trial of his cause had begun, and after the conclusion thereof."—*Fitch v. Ellison*, Colo., 24 Pac. Rep. 872.

90. OFFICE AND OFFICERS—County Treasurer.—Rev. St. Ind. 1881, § 6506, provides that, upon failure of a county treasurer to pay over the revenues collected for county, road and other purposes as required by law, suit shall be instituted therefor by the prosecuting attorney, against the treasurer and his bondsmen: *Held*, that said section applied to the failure of a treasurer whose term of office had expired to pay over the funds in his hands to his successor.—*Wood v. Board of Commissioners*, Ind., 25 N. E. Rep. 188.

91. PARTITION— Judgment.— Where the question of title is not directly put in issue by the pleadings, a decree for partition is not an adjudication that the title of the parties is as alleged in the complaint.—*Habig v. Dodge*, Ind., 25 N. E. Rep. 182.

92. PROCESS—Publication.—In a suit to establish a trust in real estate, service may be had on a non resident, though the bill also prays for an accounting and for other relief.—*Porter Land & Water Co. v. Baskin*, U. S. C. C. (Cal.), 43 Fed. Rep. 323.

93. PROSECUTING ATTORNEY—Lien for Fees.—A prosecuting attorney who obtains judgment on the relation of a county auditor upon the official bond of a defaulting county treasurer has no lien on such judgment for his fee.—*Wood v. State*, Ind., 25 N. E. Rep. 190.

94. PUBLIC LANDS—Railroad Grants.—The act of congress of July 27, 1866, granting lands to the Southern Pacific Railroad Company, was a grant of quantity; and the grantee, upon accepting the grant, filing its map of location and building and equipping its road in the time and manner prescribed by the act, was entitled to its full complement of land to the amount of 10 alternate sections per mile on each side of the road so constructed, provided the same could be found either within the specified present grant, or indemnity limits.—*Southern Pac. R. Co. v. Wiggs*, U. S. C. C. Cal., 43 Fed. Rep. 333.

95. RAILROAD COMPANIES—Consolidation.—Although the terms "railroad" and "railway" are generally synonymous and interchangeable, yet it is evident from the way in which these terms are used in Const. Pa. art. 17, that "railroad" is applied to steam railroads, and "railway" to street railways; and therefore section 4 thereof, which forbids the consolidation by purchase or lease of any "railroad, canal, or other transportation" companies owning, or having under their control, parallel or competing lines, does not apply to street railway companies, and the latter, though parallel, will not be enjoined from consolidating.—*Appeal of Montgomery*, Penn., 20 Atl. Rep. 390.

96. RAILROAD COMPANIES—Negligence at Crossings.—A finding in the special verdict of the jury that the absence of a light or flagman constituted negligence in defendant is unauthorized, since the question for the jury is not whether there ought to have been a light or

flagman on the track, but whether, in view of their absence, the train was run with prudence or negligence.—*Winchell v. Abbott*, Wis., 46 N. W. Rep. 665.

97. REAL ESTATE—Agent.—A letter to an agent, saying: "As you stated you could get $30,000 for the place you occupy, * * * and if you can, we will sell at that price, * * * and allow you two and one-half per cent, on said price,"—merely authorizes the agent to find a purchaser, but not to sell; and the contract by the agent to sell confers no rights on the purchaser.—*Grant v. Ede*, Cal., 24 Pac. Rep. 890.

98. REMOVAL OF CAUSES—Local Prejudice.—Under Act Cong. Aug. 13, 1888, amending Act March 3, 1887, § 2, cl. 4, the right of removal does not exist where the controversy is between a citizen of the State wherein the suit is pending on the one side, and a citizen of the same State and a citizen of another State on the other side.—*Anderson v. Bowers*, U. S. C. C. (Iowa), 43 Fed. Rep. 321.

99. REPLEVIN—Pleading.—In an action to recover personal property the complaint failed to aver that the property was unlawfully detained in the county in which suit was brought. Defendants pleaded in abatement that they were non-residents, that they had never been in said county, and that they had not been served with process therein: *Held*, that the plea was not demurrable.—*Rauber v. Whitney* Ind., 25 N. E. Rep. 186.

100. SUNDAY LAW—Interstate Commerce.—A steamboat while engaged in carrying passengers on the Ohio river from one Indiana town to another is not engaged in interstate commerce, though the voyage begins and ends at a city in Kentucky.—*Dougan v. State*, Ind., 25 N. E. Rep. 171.

101. TAXATION—Assessments.—Under Pol. Code Cal. § 3628, providing that "no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid," an assessment to M. & Co., of property standing in the name of M, but in fact owned by a third person, is binding on the property.—*Landregan v. Peppin*, Cal., 24 Pac. Rep. 859.

102. TAXATION—Liability of Collector.—Section 62 of the general tax law, as amended in 1885, charging the sheriff with liability for uncollected personal property taxes if he shall refuse or neglect to collect the same, or to file a list thereof as prescribed: *Held*, not to justify charging him with such liability merely because he did not file the list of uncollected taxes until after the 1st day of June, as required by law to do.—*Gutches v. Board County Com'rs Todd County*, Minn., 46 N. W. Rep. 678.

103. TOWNS—Bonds.—Gen. St. Kan. § 414, requires bonds issued by a township to be "signed by the township trustee, and attested by the town clerk:" *Held*, that township bonds were not invalidated by the fact that the name of the township trustee was signed for him by a third person, in his presence, and at his request, the bonds being subsequently duly delivered and certified, and the interest paid thereon by the township for 10 years.—*Montgomery v. Township of St. Mary's*, U. S. C. C. (Kan.), 43 Fed. Rep. 362.

104. TRUST.—A testator devised property to a trustee for investment with directions to pay the profits annally to testator's brother. The will provided that, if any creditor of the brother attempted to subject such profits to the payment of his debt, the trustee should not pay such profits to testator's brother, but should add them to the principal of the trust-fund. Gen. St. Ky. art. 1, ch. 63, § 21, provides that trust-estates shall be subject to the debts of the beneficiaries: *Held*, that the estate created by such will was subject to the debts of the testator's brother.—*Bland's Adm'r v. Bland*, Ky., 14 S. W. Rep. 423.

105. TRUSTS.—A testator devised property to his executor in trust to pay the rents to his son during life, declared that said rents should not be subjected to the son's debts, and provided that if a court of last resort should hold that they were subject to the son's debts then the executor should thereupon pay the rents to the son's wife for her separate use. A creditor of the son sued to recover such rents. *Held* that, under the Kentucky statute subjecting beneficiary estates to the debts of the beneficiary, the creditor was entitled to the rents up to the time of the rendition of the decree in the court of appeals, but not to rents thereafter to accrue, since the defeasance in the will was valid.—*Bull v. Kentucky Nat. Bank*, Ky., 14 S. W. Rep. 425.

106. TRUSTS.—J B D bought certain city lots, paying for them with his own means, and by his direction the deed therefor was made by the vendor and grantors to M A D, mother of J B D: *Held*, that a trust in said lots resulted in favor of J B D. But if the title was thus directed to be made to M A D for the purpose and intention of defrauding the creditors of J B D, he being insolvent, and contemplating bankruptcy, could not enforce such trust by action, but the legal title afterwards acquired by him was received free of any equitable claim of other heirs of M A D, she being deceased.—*Detwiler v. Detwiler*, Neb., 46 N. W. Rep. 624.

107. TRUSTS—Liabilities of Trustee.—An agreement between a trustee and a debtor to the trust fund, whereby the trustee recites that he is individually indebted to a third person, and that, in consideration of receiving a mortgage from said debtor, he agrees that part of his said individual indebtedness shall be credited on the debt to the trust fund, is sufficient evidence of the trustee's individual indebtedness to constitute the basis of an action to recover the same though the trustee signed the agreement only as trustee, and though his creditor was not a party thereto.—*Henderson v. Halderman*, Ky., 14 S. W. Rep. 413.

108. WHARVES.—A landing on a navigable river is intended for the loading or unloading of the craft navigating the river, and as the place of deposit of such freight as they usually carry, and the owner thereof is authorized to prohibit its use for unusual and unaccustomed purposes, such as the storage and keeping of timber to be rafted, which may obstruct free access to and from the vessels.—*Compton v. Hawkins*, Ala., 8 South. Rep. 75.

109. WILLS.—In an action to compel a devisee to discharge an obligation charged upon the land, it is proper to file a copy of the will, as an exhibit to the complaint, though the will is not strictly the foundation of the action.—*Watt v. Pittman*, Ind., 25 N. E. Rep. 191.

110. WILLS—Burden of Proof.—The burden is upon the proponent of a will, both in the county court and in the district court, on appeal, to prove not only the execution of the will, but the capacity of the testator.—*Seebrock v. Fedawa*, Neb., 46 N. W. Rep. 650.

111. WILLS—Construction.—A devise of a farm to a son, on condition that he "shall maintain and support my daughter Alice out of said property * * * during her natural life," does not require the daughter to live on the farm in order that she may receive such support.—*Dickson v. Field*, Wis., 46 N. W. Rep. 668.

112. WILLS—Contribution among Devisees.—By a decree of distribution, a daughter received certain bonds as her portion under her father's will. Fourteen years thereafter, part of the bonds were declared void: *Held*, that she could not avail herself of Gen. St. Ky. ch. 23, § 6, to compel contribution from the other heirs, as is therein provided for, as her cause of action upon the bonds accrued at the date of their delivery, and under chapter 71, art. 3, § 2, an action upon a liability created by statute, where no other time is fixed, is barred in five years.—*Pusey's Trustee v. Wathen*, Ky., 14 S. W. Rep. 418.

113. WITNESS—Transactions with Decedents.—Rev. St. Ind. 1881, § 500, which provides that, when any witness shall testify on behalf of an administrator concerning any conversation of a party to the suit in the absence of decedent, the party against whom such testimony is given may testify concerning the same matter, does not allow such party to state all the facts in relation to the subject-matter of the conversation, but confines his testimony to his version of the conversation.—*Copeland v. Koontz*, Ind., 25 N. E. Rep. 174.